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**The Price of Protection**  
**Gender, violence and power in Afghanistan**

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Thesis submitted for the degree of PhD in Development Studies

March 2013

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### **Declaration for PhD thesis**

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## **Abstract**

This thesis examines contestations over gender violence as points of entry into an analysis of gender, politics and sovereign power in contemporary Afghanistan. It explores the evolving parameters of what 'counts' as violence against women in Afghanistan, articulated in legal frameworks and practices, in public and media debates and in the interventions of political leaders, diplomats and aid workers. The thesis asks whether violence against women has become a governance issue in Afghanistan and what this means for the position of women and for broader relations of power. These questions are investigated through an examination of the origins and fate of a new law on violence against women, a series of controversies over women's shelters, attempts to bestow recognition on informal justice processes and the trajectories of individual episodes of violence as they travelled through different and sometimes competing legal forums. I show how the outcome of these struggles have the potential to redraw boundaries between government and family domains, and to subordinate women to kinship power, or alternatively, constitute them as independent legal persons.

The thesis further analyses negotiations over and interventions into violence against women as revealing of shifting domains and claims of sovereignty, of projects of power and of political technologies. The processes detailed in the thesis illuminate a landscape of plural and competing legal regimes that in specific times and places presided over individual episodes of gender violence. The thesis also shows that far from operating as a singular bloc, Western forays in Afghanistan produced multiple and contradictory effects on women's security and protection.

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## **Abbreviations**

AIHRC: Afghan Independent Human Rights Commission

AWN: Afghan Women's Network

CLRWG: Criminal Law Reform Working Group

DFID: Department for International Development (UK)

DOWA: Department of Women's Affairs

ISAF: International Security Assistance Force

MOWA: Ministry of Women's Affairs

PDPA: People's Democratic Party of Afghanistan

TLO: The Liaison Office

UNAMA: United Nations Assistance Mission in Afghanistan

UNIFEM: United Nations Development Fund for Women (merged into UNWOMEN in 2011)

UNODC: United Nations Office on Drugs and Crime

USIP: United States Institute of Peace

WAW: Women for Afghan Women



## **Note on Language**

The languages of administration, and those most widely spoken in Afghanistan are Dari ( a dialect of Persian) and Pashto . Both contain a number of Arabic loanwords.

For words that have become common in English; such as sharia, ulema and mullah, I have used the established form. Words less common in English appear in italics throughout the text and with a brief explanation the first time they are used.

## Introduction

### I. ‘The President is selling the people’s honour’

In the spring of 2008, Sayed Noorullah of Sarepul province started a public campaign to get the Afghan government to punish his niece’s rapists. His teenage niece had been tricked into a house and raped by two young men, one of them the son of a powerful former commander and currently an MP in the province. When attempting to report and pursue the case in his home province of Sarepul, he had been beaten and intimidated by local government officials. However Noorullah was not one to give up easily. He appeared on the national media, demanding that the government take action. But the threats continued. Upon the intervention of local human rights workers the case was eventually moved to Kabul, where the man again spoke on national TV, accusing President Karzai, the head of Parliament and the Chief Justice for failing to address the case. Meanwhile, another family from the same area also went on TV, and in a disturbing TV clip, recounted how their young daughter had been raped by five government officials.

The cases were becoming a major embarrassment for the President, who swiftly fired senior police officials in the province and summoned the uncle for an audience, where he promised to personally follow up the case. Eventually the son of the MP was sentenced to 20 years in jail at the primary court in Kabul. The case, however, was not over. As it was coming up for second instance in the courts, the uncle reported continuing intimidation and interference, and continued his media campaign. Eventually senior parliamentarians and confidantes of the president brokered a deal. The families of the victim and the perpetrator were to reconcile. Declaring himself exhausted by the threats, and for the sake of his family’s safety, Noorullah agreed. In return, he would get a *baad* – a girl given in compensation, who was to marry the uncle’s son, a guarantee on his life signed by the elderly leader Mujadiddi<sup>1</sup> and according to rumours; a substantial amount of money. Against this, the families would be declared reconciled and the uncle would stop pursuing the case. In the two following appeals in the secondary court and at the Supreme Court, to the surprise of human rights advocates and supporters who had involved themselves in the case, Noorullah was no longer present in

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<sup>1</sup> Sighbutullah Mujadiddi was a former mujahedin (resistance fighter against the Soviet and the communist government during the cold war) and a personal friend of President Karzai. He held a number of high-level official positions during the post-2001 period, including leader of the Upper House of Parliament.

court. The punishments were said to be reduced, and there were rumours that the son of the MP went in and out of prison at his convenience. In Sarepul, Sayed Noorullah described himself as having been defeated: ‘We were fighting against injustice, and we lost.’<sup>2</sup>

The case in Sarepul was known all over the country. For some, the way that the family had spoken about the rape on national TV was nothing less than shocking. Making such a violation public, and openly appealing to the authorities for justice was a humiliating admission of weakness. Not only had the family been unable to prevent such an act – in order to redress it they evidently had no other recourse than to resort to making public what should have remained private and to ask the government to act on their behalf. For others, the case was a stark illustration of the way in which the government prioritized shady deals with warlords over women’s rights, or alternatively, over the honour of ordinary citizens. Some also thought that the rape and the collusions to prevent it from reaching the courts was a proof of the brutal, immoral conduct of the warlords associated with the Northern Alliance, the majority of whom were non-Pashtun minorities, and of how the president had compromised himself by relying on them for his power base.

The case was also frequently cited as a proof that Afghanistan needed stricter legislation on rape and violence against women that would prevent authorities from interfering in cases in which government officials were involved. Not everyone supported the family however. Some saw the case as overblown, and suggested that what was not a very serious incident at all had been blown out of all proportion because it had been taken up by an ethnic minority group, the Hazaras, as mean of asserting themselves in the province.

Some two years later, another case of violence outraged the country. This time, however, the family of the young woman involved had turned against her, whereas the government’s reaction was one of total impotence. A young couple accused of adultery was stoned and killed by a crowd in the Northern province of Kunduz, following a sentence issued by the local Taliban government. Apart from condemning the case, the government seemed destined to do little upon receiving the news, with local officials saying that the area was outside of government control. It emerged that the couple, Siddiqa and Qayum had eloped. Siddiqa, facing a marriage against her will had apparently befriended her co-eloper Qayum, a poorer man who was already married. Together they had escaped to another province. Hearing the news, a large number of men from Siddiqa’s family, an influential and rich tribe, surrounded

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<sup>2</sup> Interview # 76. See Annex 1 for a list of interviews.

Qayum's family home, threatening to attack the house unless the Siddiqa was returned to them. The family of Qayum consequently convinced the couple to return and over the phone the former *woleswal* (district governor) guaranteed their safety. Qayum's relatives immediately set out to broker a deal that would settle the matter with Siddiqa's family, who had been greatly affronted by the elopement. A settlement involving a substantial amount of money and another girl from Qayum's family was agreed upon, and frantic efforts to collect the money ensued. Meanwhile the couple found themselves turned over to the custody of the local Taliban. Confessing to adultery, they were sentenced to death by stoning by a committee of Taliban ulama. With Qayum's family still scrambling for the last *afghanis* to settle the case, Siddiqa and Qayum was stoned and killed by a large group of villagers and the Taliban, with no protests from Siddiqa's family. Horrific images filmed by someone in the crowd later emerged and led to renewed calls for government action. However a year later no arrests had been made.

The role of the government, as well as other powers, in intervening in abuses against women was fiercely contested in the decade following the US-led overthrow of the Taliban in 2001. The question of to what extent, and how, central authorities should intervene in gender violence and the very question of what exactly constituted violations, and who was the violated party, was of great importance for the kind of gender relations to be publically affirmed. But there were also other issues at stake; boundaries between private and public domains, different notions of rights, obligations and authority, and competing political and legal orders.

The terrain on which these battles were fought out was extraordinarily fluid and fragmented. A beleaguered group of women's rights activists in the capital, many of them recently returned from exile, made tenuous alliances with parts of the international donor community, in what turned out to be a difficult balancing act between considerable concessions to conservative adversaries, on the one hand, and dependence on external actors, on the other. Thus, an alliance of women's rights activists, foreign embassy personnel and progressive justice officials succeeded in getting a new law promulgated; the Law on Elimination of Violence against Women (EVAW law hereafter). But the process had revealed bitter divisions within women's groups and difficulty in getting wider acceptance for their ideas, which exposed their dependence on a friendly executive and ultimately, a degree of isolation from broader political constituencies. The perils of depending on international actors were brought into sharp relief, moreover, when the very apparatus that the EVAW law was premised on –

the state courts – was potentially weakened by international attempts to promote informal justice processes. These ‘customary’ forums did not follow statutory law and often discriminated against women, for instance by practicing *baad* – the giving away of a woman in marriage as a settlement mechanism.

The unpredictability produced by competing legal regimes was felt acutely by numerous women and young girls who fled unwanted marriages or family abuse and sought the assistance of the courts and the protection of shelters. These institutions were a testing ground for the kind of gender relations to be officially sanctioned. Whereas in some cases, they upheld women’s claims, on many occasions they sided with their families’ counter-claims, sending the women back to their families or to jail. In effect, the actions of government officials often signalled that public regulation in this domain would reinforce kinship and conjugal claims over women rather than a transformation that granted women full legal personhood. Meanwhile, the shelters housing many of the ‘runaway’ women faced a conservative backlash, stirred up by media campaigns that drew upon popular discontent with a prolonged and dysfunctional Western intervention to denounce shelters as a foreign implant.

Violence inflicted upon women, like any violence, is inherently tied up with power relations. First of all, what counts, or is recognized as violence in any given situation is an empirical question with political implications. The non-recognition of (certain forms of) violence against women as violence *per se*, or as a violation of *women* (as opposed to violations against their guardians, husbands or family) contribute to its perpetuation. The importance of questioning the notion of a private, benign family domain, free of power relations and abuse is an important feminist insight which has transformative potential for gender relations and women’s status vis-à-vis men. The ways violence against women are defined and responded to are also symptomatic of other forms of power. Claims and counterclaims over gender violence provide a map to contending fields of power in Afghanistan; of competing, parallel or overlapping legal regimes, and of multiple assertions of sovereign rule.

This thesis therefore uses contestations about violence against women as points of entry to an analysis of gender, politics and governance in contemporary Afghanistan. But the very term ‘violence against women’ carries a historical baggage of its own, a baggage that requires some discussion at this point. Since it moved to the centre of transnational women’s activism in the early 1990s, (Merry 2006; Merry 2009) violence against women, known by its abbreviation VAW, has become an established term and a particular discursive frame

underpinning a global apparatus of action, intervention and regulation. This happened when feminist activists around the world, who had set up shelters, counselling centres and batterer treatment programmes ( Merry 2009: 76) and launched anti-rape campaigns, started to come together on an international platform to get violence against women defined as a human rights violation. Their demands proved phenomenally successful, resulting in a series of UN resolutions and declarations, the creation of a post of Special Rapporteur on Violence Against Women, the articulation of the principle of 'due diligence', which went some way in making states accountable for human rights violations inflicted on women by non-state actors such as family and community groups, and the enumeration of various incidences of sexual violence as serious crimes in international law (Saghal 2006). As Merry points out, within this universe, the meaning of VAW has expanded from 'male violence against their partners in the form of rape, assault and murder,' to include 'female genital mutilation/cutting/excisions, gender-based violence by police and military forces in armed conflict as well as everyday life, violence against refugee women and asylum seekers, trafficking in sex workers, sexual harassment, forced pregnancy, forced abortion, forced sterilization, female foeticide and infanticide, early and forced marriage, honour killings and widowhood violations'. (Merry 2009: 82). And as we will see later, the Afghan EVAW law, decreed in 2009, listed many of these acts as violence but also added a number of other acts more particular to Afghanistan and what many Afghan women considered to be a violation of their rights, entitlements or persons, such as the cursing of women, or the false denial of an existing familial or marital relation to a woman, absolving obligations towards her.<sup>3</sup> The EVAW law was therefore developed at the intersection of transnational and national registers.

As the global campaign against VAW moved to the centre stage of international politics, it also, perhaps unsurprisingly, became entangled in the reproduction of existing global power structures. With the shift from national to global advocacy came a more professionalized, bureaucratic mode of operation, standardized programmes and compliance mechanisms and the hierarchization of expertise. In an influential article, Kapur (2002) scrutinizes the political effects of this global VAW discourse, noting that it rose to international prominence through the obfuscation of the power relations that position Western/white women/feminists differently from ethnic minorities and women in the South, thereby constructing Southern and non-white women subjected to violence or abuse in the south as victims of their culture, and

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<sup>3</sup> In Afghanistan, where government registers often do not exist and war has caused displacement, it may be possible for someone to falsely deny an actually existing family relationship, for instance to a sister or a sister-in-law.

in need of ( outside) protection. Kapur argues that this effectively amounts to a kind of gender and cultural essentialism that can neither accommodate the different positions that women inhabit, nor the historically specific forms that violence against them take ( ibid).

Stating that this thesis is about violence against women does not mean it places itself uncritically into this VAW discourse. By this I mean that I do not assume the existence a fixed ‘pool’ of practices, a finite (or absolute) set of actions awaiting recognition as violence against women. This would suggest an end point of liberation and inevitably place countries along an axis of development or civilisation, enabling the kind of global hierarchies Kapur draws our attention to. Instead, my aim is to examine competing claims made during a particular historical period about the nature of certain practices; to examine whether they are held to constitute violence or transgressions, and if so, against whom. But if the thesis is not an attempt to uncritically reproduce the VAW discourse nor is it a bid for relativism. Whilst I recognize the hierarchies generated by the VAW discourse, and also believe that it is neither possible nor desirable to define, once and for all, out of context and somehow prior to power relations, the exact register of actions that would constitute violence against women, I nevertheless maintain that this insight should not make us blind to the fact that in a given context the non-recognition of certain practices as violence, or violations, can comprise a blueprint for impunity and be a symptom of unequal gender relations.

Thus, it is the struggle over the meanings of violence against women in a specific period and context, and their implications for gender and power that I explore in this research. Through an ethnographic lens, I examine shifting demarcations of domains, notions of gender, personhood, of obligations, entitlements and rights as they are articulated in specific instances of contestations over gender violence. Throughout the text, I use the terms ‘violence against women’ and ‘gender violence’ interchangeably when referring to the empirical focus of my research; abuses committed against women. However, I recognize that each word is imprecise. As I have argued, ‘violence against women’ is a categorization of an event or practice connoting transgression or violation, but also an established activist and policy discourse with particular political logics and effects. Gender violence, on the other hand, has come to delimit a field that comprises violence against women *plus* sexual violence against men.<sup>4</sup> This is problematic in so far as it suggests that only certain forms of violence are gendered, when in reality all social practices have gendered dimensions (although it

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<sup>4</sup> ‘Gender-based violence’ is sometimes used in a similar way, particularly in policy-oriented literature.

nevertheless remains the case that some acts and events might have starker gender dimensions than others). In this thesis I use gender violence only to refer to injuries inflicted on women, but adopting this usage is merely a practical matter: I do not wish to suggest that men cannot be at the receiving end of violence enabled by, or in response to violations of, gender orders.

## II. Situating the thesis

This work straddles legal anthropology, gender studies and scholarship on violence, on transnational power relations and on international “statebuilding” operations. One of its chief aims is to make a contribution to the field of Afghan gender studies that shows that the study of gender in Afghanistan can illuminate numerous questions pertaining to governance, sovereignty and power. Perhaps one of the most politicized figures of global affairs in the last decade the ‘*Afghan Woman*’ is saturated with connotations. In a series of homogenizing representations, she has been invoked as a victim whose circumstances necessitated bombing raids and military operations,<sup>5</sup> or as a haunting symbol of Western imperialism. Her circumstances and appearance are constantly taken note of and made to serve as an indicator of various political assertions; the hypocritical hollowness of Western rhetoric, the hapless backwardness of Afghan culture, or of Afghan’s religious adherence or foreign contamination. Large funds are raised in her name and numerous reports devoted to give her voice and uncover her true views. Those who can claim this identity have also learned to utilize its potential mobilizing power. Claiming to speak as ‘an Afghan woman’ to international media outlets looking to fill this generic slot can be a temporary shortcut to influence in a setting where most other political channels have been closed off by violence and militarization<sup>6</sup>.

Despite the many ways in which Afghan women have become interlocked with various political claims, the scholarly literature on the intersections of gender, power and politics in Afghanistan is scarce. More recent literature tends to be based on textual examination of

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<sup>5</sup> Schueller points out that critiques of colonial rescue binaries also comes from ‘within’; from Western accounts that do not without problematize the US-led invasion but nonetheless seek to rehabilitate Afghan women’s agency ( Schueller, 2011). Statements such as ‘Afghan women can save themselves, and I need to be saved too’ (p. 7) invite to an individualized cross-cultural solidarity but without attending to different positions inhabited by Afghan and Western women ( *ibid.*).



Western discourses linking Afghan women to projects of rule or invasion (Abu-Lughod 2002; Ayotte and Husain 2005; Stabile 2005; Schueller 2011). On the other hand, those contributions seeking to elaborate on more localized relations of gender and power typically have done so only as a side pursuit and often subscribe to a conceptualization of Afghan society as consisting of separate orders locked into a perpetual struggle over the control of women. For instance:

Rural Afghanistan is the root of tribal powers that have frequently doomed Kabul-based modernization efforts. Social traditionalism and economic underdevelopment of rural Afghanistan have repeatedly contested the centre (Kabul), thus a better understanding of tribal controlled areas is essential to empower women in these regions. For women in rural Afghanistan, control over their lives and gender roles is determined by patriarchal kinship arrangements' (Ahmed-Ghosh 2003)

Quotes like this conjure up a spatial map of gender and power in Afghanistan; the central state is residing in the capital and urban centres; enclaves of female emancipation, whereas the majority of women are hidden away in the deepest corners of tribalism in faraway villages and forts, kept out of reach by their menfolk and shielded from the grasp of government, modern law and individualism. There is an evolutionary dimension to this spatial optic too; the gender order of the 'tribe' is expected to gradually wither away as it comes into contact with the more modern 'state'. Such notions reflects a tendency in studies of Afghanistan to infer from separate realms (in the sense of boundaries *made*, and thus in need constant maintenance) the existence of separate, discreet 'logics', or in the terminology of Edwards, different 'moral systems' (Edwards 1996) <sup>7</sup> More recent work has slowly started to discard this framework (Edwards 2002; Green 2008; Coburn 2011; Sharan and Heathershaw 2011), instead opening up for contingent, hybridized forms of rule and governance. However, as the Ahmed-Ghosh quote above testifies to, notions of self-contained and insulated governance and political orders continue to hold sway in the limited scholarship on gender and politics in Afghanistan. This thesis has attempted to address this gap by carrying out a study of women and power in Afghanistan that apply an open ended, practice-oriented perspective through

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<sup>7</sup> In his 1996 book *Heroes of the Age* David Edwards introduces his hypothesis that Afghanistan's troubles over the last decade in last instance can be explained by 'certain deep-seated moral contradictions that press against each other like tectonic plates at geological fault lines below the surface of events' ( p. 3). 'Honour, Islam, and the rule of the state are to Edwards distinct moral orders that are in many respects 'incompatible with one another.' (p. 4). However in his 2002 sequel Edwards appears open to a revision of this hypothesis, observing that by the mid- 20<sup>th</sup> century, 'old divisions' were breaking down and divisions (e.g. between tribe and state) were becoming blurred, ( p.102-103) opening up possibilities for new hybrid orders (Edwards, 2002).

ethnographic examinations on statehood and authority, which has been particularly apparent in studies from Sub-Saharan Africa. (Comaroff and Comaroff 2006; Hansen and Stepputat 2006; Lund 2006; Bertelsen 2009; Comaroff and Comaroff 2009; Hagmann and Péclard 2010) This open-ended approach also enabled me to make visible and available for analysis *transnationally* constituted assemblages of rule.

But the thesis also aims to add to the comparative feminist scholarship on women, law and power, where Afghanistan has received little, if any systematic consideration.<sup>8</sup> Rather than taking the field of family law as the starting point, the thesis has centred on criminal law by making definitions gender violence the topic of inquiry. In this sense, the thesis could also be a contribution to feminist analysis of criminal law, which in countries with Islamic legal traditions has been relatively sparse (Zuhur 2005)<sup>9</sup>. More generally I have also sought to bring the issue of gender in Afghanistan into closer dialogue with the rich literature on gender in the Middle East, which over the last three decades has illuminated the great varieties of gender relations and government practices across time and space in Muslim majority countries, thereby making important points about the imperative of seeing gender relations as historically specific, rather than derived from religion or culture (Kandiyoti 1991; Keddie and Baron 1991; Kandiyoti 1996; Abu-Lughod 1998; Meriwether and Tucker 1999; Tucker 2008).

Finally my analytical framework has also in many ways heeded Abu-Lughod 's call to explore 'the social life of Muslim women's rights (Abu-Lughod 2010), to :

..track carefully, across multiple terrains, the way both practices and talk of rights organize social and political fields, producing organizations, projects, and forms of governing as much as being produced by them. (p. 32-33)

Given the enormous attention they have been the object of in the last decade it is not at all surprising that 'Afghan women's rights' have found themselves in the service of international and local agendas of various kinds: war, careers and the accumulation of aid money to mention a few. But the relationship between the 'Afghan woman question' and practices of

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<sup>8</sup> Kamali's discussion on family law ( Kamali, 1985) is a partial exception, although this detailed discussion on Afghan family law, constitutions and the judiciary is a conventional legal study that does not explicitly consider how law is productive of gender and power.

<sup>9</sup> This is particularly the case with rape and sexual violence. ( But see work on Ottoman Egypt (Sonbol, 1997 Kozma, 2004). and Pakistan (Zia, 1994, Quraishi, 2000, Lau, 2007). 'Honour killings' as a state sanctioning of relatives' claim over female family members have received somewhat more attention.

power need not always be so obvious or instrumental. Through attempts to secure women in Afghanistan protection against gender violence ambiguous victories, curious alliances and novel hierarchies often materialized. These more subtle and mostly unspoken dynamics, which Abu-Lughod calls attention to, are part of the discussions in the thesis.

### **III. Chapters outline**

The first chapter of this thesis describes the analytical and theoretical framework of the study. I explain how contestations over gender violence can serve as entry points to understandings of relations of gender, power and governance. I further argue the concept of sovereignty brings into focus the link between law, governance and power, and I discuss how the concept of assemblage can be used to analyse contingent formations of intervention and rule.

In Chapter 2, I provide an overview of the context in which my research took place and an account of how I carried it out. I first sketch out the broader political dynamics evolving in Afghanistan over the last decade, which formed the immediate backdrop to the events and processes which were at the core of my research. This context also positioned me as a researcher in particular ways, most obviously by restricting my movements. I discuss this when giving an account of the trajectory of my research, firstly elaborating on my methodological framework, and then chronicling my data collection process. Furthermore I explain how I approached confidentiality and anonymisation of informants and I discuss ethical challenges related to my research topic.

Chapter 3 presents the social and historical context to contemporary claims and counterclaims regarding violence against women. I start with a discussion of gendered boundaries in Afghanistan, describing how ideals of female seclusion structure definitions of violence in particular ways. I argue that honour, rather than a reified norm, must be understood as an idiom through which claims to status are expressed. Furthermore I discuss the origins and evolution of Afghanistan's legal system, given that its shifting orientations and reach have set the stage for how, today, individual cases play out in courts and public forums. I examine the historical precedents of today's efforts to achieve closer state regulation of the family and abuses committed within it. Finally I look in detail at two important parameters of how gender relations are negotiated and contested today; the current legal landscape and the post-2001 arrival of donor driven gender activism (Kandiyoti 2009).

In Chapters 4 and 5 I examine key parts of legal and institutional apparatus erected in Afghanistan since 2001 to protect women against violence. Chapter 4 focuses on a new law decreed in the summer of 2009 – the law on Elimination of Violence against Women (EVAW law). It looks at the conception of this law, the tactics employed in promoting it, the opposition it encountered in parliament and the manner in which it was implemented. In Chapter 5 I investigate the background to a series of public controversies over women's shelters. I show how the shelters, funded by donor aid and operated by NGOs were conceived of and rendered problematic as a space where women appeared to be without supervision in multiple ways; out of the reach of families, the government and the nation. I examine the pitfalls of shelters as transnational entities; their international support was a double-edged sword. It gave them considerable room for manoeuvre, but at the same time left them vulnerable to both local attacks and to ensnarement into other hierarchies.

Chapter 6 offers an interrogation of an alternative sovereign constellation, centred on Afghanistan's informal justice mechanisms, that was rapidly gaining traction amongst Western aid workers, researchers and militaries. I trace the origin of this assemblage, explaining its sudden popularity and questioning its egalitarian claims.

Finally in Chapter 7 I elaborate on the dynamics of violation and protection through an in-depth discussion of four individual episodes of gender violence and their aftermath. I explore what counts as violence in public discourse, arguing that by and large incidents of gender violence are articulated as infractions not against individuals but kinship authority over women. I also take a closer look at how gender violence, framed in this way, can act as foci of mobilization in conflicts over state power.

## **Chapter 1: Gendered violations and sovereign claims**

### **I. Introduction**

My aim in this chapter is to lay out a set of analytical tools enabling me to use concrete contestations over gender violence to explore emerging gender relations, sovereign fields, institutional practices and political landscapes in contemporary Afghanistan. I start by demonstrating how the naming and non-naming of incidents as constituting acts of violence imply power relations and therefore, that what counts as violence against women tells us much about gender hierarchies. I argue that the construction of certain practices as prerogatives vested in families rather than violence directed at women as individuals affirms a gendered hierarchy in which women are subordinated to the sovereign power of kinship and husbands.

Then, I turn to the broader power relations operating through discourses about gender violence. As for instance Hajjar argues, struggles over women's rights are in many ways also contestations over juridical jurisdiction and authority (Hajjar 2004). But analyses seeking to elucidate this relation have often taken place in more stable and settled settings in which state, clergy, or kinship appear as enduring competitors in terms of jurisdiction over women. I argue that such notions of fixed sovereigns never adequately reflects a particular historical reality, but is particularly inappropriate for contexts like contemporary Afghanistan, where power and technologies of rule are much more fluid, complex and multi-layered than what such a neat triad would suggest. In particular, ideas of fixed sovereign orders cannot accommodate transnational dimensions of power configurations, and their multiple and shifting nature.

However the contending practices of defining and regulating gender violence can do more than offer maps of gender relations and sovereign fields. They can tell us about institutional practices, political landscapes, the universes of meaning within which different actors operate and how they formulate personhood, rights and morality. This is my focus in the last sections of the chapter. I illustrate the utility of an analytics of governmental assemblages for teasing out the hidden power dynamics at play when, for instance, activist politics centred on legal changes, the establishment of shelters, and reform of the justice system are redefined as questions of welfare or security, to be solved by technical interventions devised by experts.

Finally, I show how even routinized interventions are unstable projects, maintained and challenged through articulations of morality, personhood and historical narratives. In turn, these articulations constitute windows to understanding of politics and power in a given historical context.

## **II. Gendered violations and sovereign power**

### *Naming violence*

The structuring theme of this thesis is violence against women. My point of departure is what Coronil and Skurski term ‘the growing scholarly effort to counter reification of violence by analysing it as a complex set of practices, representations and experiences, and by investigating rather than reproducing its appearance as a tool of power and a social force.’ (Coronil and Skurski 2006: 2). Long present in anthropology, postcolonial studies and feminist theory this analytical approach also made its way into a large, multidisciplinary literature on civil wars emerging in the late 1990s, sometimes referred to as the ‘new wars debate’. Some of the contributors to this debate argued for the need to understand war and violent conflict as a historical process and for shifting the focus from causality and occurrence to the social and political transformations taking place during and through violent conflict (Keen 1998; Richards 2004; Cramer 2006).

As Coronil and Skurski (2006) point out, a perspective that views violence as a social practice, instead of a ‘thing’ occurring outside social relations, suspends a commonly assumed boundary between violence and the ordinary, a boundary according to which violence is relegated to a domain of breakdown, transgression or danger, as distinct from or antithetical to social order (Ibid: 3). Once this boundary is unsettled, it becomes obvious that violent practices also occur in the everyday, in routinized social and political relations, as integral to and not necessarily in opposition to, order and continuity. Having adopted a lens through which everyday violence is made visible, it also becomes obvious that rather than the existence of separate and fixed domains of violence and non-violence, what is actually happening is the classification of certain practices and actions as violence, and others as (for instance) law enforcement, discipline or legitimate resistance. Thus, what in a given context is viewed or named as violence is contingent on power relations and one’s situated perspective.

It follows that the conditions under which violence becomes constituted or named must be included in the analysis (ibid: 4). Violence, in English (*khoshonat* in Dari) and many other languages connotes transgression and illegitimacy. Describing something as an act of violence suggests it is a threat to the social, sexual and political order and that it must be stopped, punished or avenged. On the other hand, the non-recognition of violent acts renders them non-problematic or even positively necessary, thereby permitting or sanctioning their continuation. Naming violence is therefore invested with great political importance, and categorizations of violence are therefore not fixed forever, but sites of contestation (Merry 2009). What counts in a given context as violence can therefore be said to be a first order question (Hume 2007).

### *Gender, law and violence*

When applying this lens specifically to gender, delineations or definitions of violence against women in a given historical context comprise entry points to an analysis of gender relations. When battering, sexual coercion, or forced marriage are considered ( even if subject to various conditions) as the prerogatives of husbands, fathers or brothers, rather than abuses or violations against the women concerned, this reveals and reinforces specific norms of gender relations which place women and girls under the authority of their male relatives, husbands and in-laws.<sup>10</sup> Concessions given to male family members to kill female relatives whom they suspect of pre- or extramarital sexual activity similarly reflect and institutionalize a gender order in which women's sexual conduct potentially undermines the social integrity of her family, making it paramount and legitimate that male family members police and punish transgressions (Kogacioglu 2004). If, as under British common law during earlier times, rape is an infraction against men, to be lodged by the husband of the woman raped against the man who violated her, marital rape is made a legal impossibility, serving to protect a man's right to exclusive sexual access to his wife (Quraishi 2000; Reitan 2001).

When trying to decipher the naming and non-naming of violence and how these are gendered, criminal codes would be one of the first places to look. However, research on gender and law in Muslim-majority countries, which share a common legal tradition with Afghanistan, have

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<sup>10</sup>This was starkly illustrated in a recent statement by the Afghan ulema council, who, espousing a typical view by conservative Islamic scholars and their allies, stated that women are secondary to men and violence against wives up to a point is ordained. Official declaration by the National Ulema Council of Afghanistan, 2nd March 2012.

mostly focused on family and civil law. Derived from fiqh (Islamic schools of jurisprudence) in various ways, civil laws in these countries typically bestow privileges upon men in matters such as marriage, divorce, inheritance, children's custody and the right to travel. As Zuhur points out in a first comparative review of women and penal codes in the Middle East, criminal law has to a lesser degree than family codes been the focus of feminist activism and research (Zuhur 2005), although the former equally construct gender hierarchies, chiefly by granting impunity for abuses and violence against women. In particular such impunity is conferred to family members, through reduced or no punishments for 'honour killings', spousal violence, marital rape or forced marriage.

At the same time, as both Gangoli (2007) and Zia (2004) argue, there is a continuum between civil and criminal law as far as the regulation of women and sexuality is concerned (Gangoli 2007). The legal impossibility of marital rape, in conjunction with other legal and /or wider cultural practices that enable marriage without consent, criminalize women who leave home without family permission, allow for violence within the home, or stipulate a wife's duty to submit sexually or otherwise within marriage might combine to produce violence hidden from public and legal recognition, and to affirm kinship or conjugal authority over women.

### *Sovereignty*

Feminist analysis has pointed out how the construction of a private/ public dichotomy in which certain abuses against women are considered private and therefore beyond the law and political intervention in effect establishes a hierarchical gendered relationship (Schneider 1991). The concept of *sovereignty* is useful for appreciating this relationship. As Comaroff and Comaroff (2006) write:

We take the word sovereignty to connote the more or less effective claims on the part of any agent, community, cadre or collectivity to exercise autonomous, exclusive control over the lives, deaths, and conditions of existence of those who fall within a given purview, and to extend over them the jurisdiction of some kind of law (p.35).

When violence and even murder of women at the hands of their husband and family are considered permissible, women are effectively placed under the sovereignty of their relatives and husbands, rather than under public authorities such as the state. In this sense, a form of what Humphrey calls a 'localized sovereignty', 'nested' within 'higher sovereignties' but



‘nevertheless retaining a domain within which control over life and death is operational’ (Humphrey, 2004: 420) is granted to the household head. The feminist analysis and activism around violence and women that have focused on making violence against women a public issue, have thereby been mounting a challenge to the sovereign claim of families over women. Indeed once certain events and actions become named as violations against persons other than the sovereign this very act of naming signifies a challenge to or a modification of absolute sovereignty, as it articulates other people as holders of rights or partial holders of rights. This is also the case with violations carried out by ‘outsiders’: The framing of sexual violence as an offense against a women, as opposed to an offense against her husband or father, constitute women as legal persons to whom higher sovereigns hold obligations and potentially signifies a radical transformation of gender relations. As we shall see, the contestations over gender violence taking place in Afghanistan embodied these competing claims of sovereignty at their heart: Families claimed sovereign rights over women; to preside over their marriage, sexuality and to sanction insubordination, sometimes through violent means. Counterclaims asserted women’s autonomous status, their right to make independent decisions and claims of damage, against their own families or against others.

It should be mentioned that in many instances, re-definitions of the subjects of violation does not entail the relinquishing of sovereignty and the emergence of full right holders, but a modification, akin to a form of a guardianship or trusteeship. For instance the absolute power husbands hold over wives might be modified so that beating is allowed, but beating to death is not. Similarly, when the EVAW law was amended to placate conservative members of the Afghan parliament, fathers were exempted from a general ban to marry off underage female relatives, but only if done with ‘fatherly kindness’- i.e. without cruelty or intent to profit by selling them. In other words sovereignty became subject to limits and regulation than being abolished altogether.

### **III. From gender relations to broader fields of power**

While definitions of and negotiations over violence against women are entry points to gender relations, they also enable an analysis of other fields of power. As Hajjar points out, struggles over women’s rights are also contestations of over jurisdiction and authority (Hajjar 2004). Attempts to make gender violence ‘public issues’ could signify an important shift in the

demarcation between the private domain of family and kinship on one hand and public authorities on the other. For instance, if a rape case is adjudicated in a state court rather than settled amongst the families involved or in a 'traditional' body for dispute settlement, this expands or attempts to expand the domain of the state whether by conscious political strategy or merely as a by-product or outcome. A large body of literature on the Middle East emphasizes how rulers and governments have attempted to break up kinship structures by for instance promulgating family laws (Kandiyoti 1991; Joseph 2000; Charrad 2001; Noelle-Karimi 2002) or by taking over the policing of female sexuality from relatives and communities (Baron 2006). The state feminist policies of postcolonial Middle Eastern leaders allowed them to undermine sub-national elites and assert state power through promotion of women's rights (Kandiyoti 1991, 1992 in Cole 2009; Al-Ali 2007). The attempts by successive Afghan rulers to curtail brideprice and forbid child marriage espoused similar agendas (see chapter 3). But there was no inevitability to the emergence nor to the continuation of such policies. Comparing Tunisia, Morocco and Algeria, Charrad argues that the type of gender relations promulgated in law was a reflection of the government's power base in each country. Tunisia, where the government was independent of tribes and lineages, had the most liberal family law of the region, whereas in Morocco, where the postcolonial state had formed an alliance with tribes, family law was conservative and favored lineage over women's rights. In Algeria, Charrad argues, a deadlock in which the government was partially allied to kin-based factions but unable to overcome internal divisions, delayed the promulgation of a family law until 1984, when a conservative code was adopted (Charrad 2001).

The ways in which rulers expanded or consolidated power through gender policies waxed and waned with their political trajectories and the apparatus and power bases available and attractive to them. Thus for instance Saddam Hussein, who in his early phases of rule had adopted fairly progressive gender policies, ( and built up a modern bureaucratic cadre and party to counter 'old elites) when faced with a crumbling hold on power after the war with Iran, and again after the Gulf war, started to reach out to tribal leaders and religious leaders. This saw a general roll back of women's rights and a number of legislative changes that spoke to these constituencies, such as a decree allowing 'honour killings' of unfaithful wives ( Tripp in Cole 2009, Al-Ali 2007: 209).

As this literature points out, the kind of gender relations sanctioned by states as they expand their jurisdiction over women and family are historically contingent. Forged in specific

contexts and moments, the actual form of state regulations must be investigated empirically, instead of assuming the existence of monolithic and successive legal and governance orders ( e.g *the family, the state, the tribe*) each with corresponding ‘ready-made’ subject positions, moral repertoires, purposes and technologies. History shows that there is no teleological path according to which women becomes full legal persons as they enter into the public domain. For instance if episodes of gender violence become public issues requiring the intervention of state authorities this is not inevitably synonymous with a transformation in gender relations which bestows independent legal personhood on women and consequent obligations on the state, at the same time modifying or eliminating male authority over women. Instead, the manner in which episodes of gender violence are articulated as public issues (and which types of episodes are considered public matters) might very well serve to reinforce male/ family authority or guardianship over women. Police officers and government officials might collude to send unaccompanied women who have fled unwanted marriages or family violence back home, thus affirming their families’ claim over them. Rape might be articulated and recognized as a violation against the father or husband, thus creating obligations between the government and the male relatives akin to obligations to upheld private property. Even when the state acts directly ‘on women’ without its interventions being mediated through male relatives, patriarchal gender relations which subordinate women might nonetheless be sanctioned, as in the punishment of adulteresses or in state-enforced hymen examinations or compulsory dress codes. These variations are contingent on the particular trajectories of state formation, the power base of rulers, and the success and focus of women’s political mobilization.

Theoretical and analytical perspectives from legal anthropology are helpful for the purpose of appreciating and analysing such variations. What Merry terms ‘new legal pluralism’ has done away with ‘readymade models of (and for) relationships between law, state and authority’, instead embracing diversity and hybridity, and practices over formal texts (Bertelsen 2009). This shift stems from a rejection of systematic dualism, that is, self-contained and insulated legal orders, in favour of a perspective in which

plural normative orders are part of the same system in any particular social context and are usually intertwined in the same social micro-processes (..) The particulars of the relationship in any social location are historically derived and unsettled (Merry 1988: 873).

In other words, what this perspective embraces is the possibility of historically contingent and open-ended practices of adjudication and governance, where outcomes are not predetermined

and where there is certain degree of borrowing and mimicking from one institutional universe to another; what Lund with others refer to as leakage of meaning and institutional bricolage (2006). As will be detailed later in the thesis (in chapter 7) the case from Sarepul offers striking illustrations of how the various actors involved were engaging in such practices of bricolage; the president used the powers of his office to impose a reconciliation, which took place outside of legal processes and through a reparatory bride offer, but ultimately backed up by the state. The uncle of the raped girl, similarly, fused different repertoires when calling upon the president to bring him justice and protect the people's honour.

Legal pluralism as a field of study, in so far as it concerns itself with multiple and situated claims to govern, to adjudicate, to exercise legitimate violence and to rule (Comaroff and Comaroff, 2006) has increasingly claimed centre stage of, or merged with, anthropological studies of governance, power and orders. (Comaroff and Comaroff 2006; Lund 2006; Bertelsen 2009; Comaroff and Comaroff 2009; von Benda-Beckmann, Franz von Benda-Beckmann et al. 2009). This literature has been particularly prolific on Sub-Saharan Africa, with scholars noting that government institutions are not the only, or even the dominant framework for solving disputes, imposing law enforcement or allocating resources. Rejecting the notion of 'state failure' as a useful analytical device, these scholars have set out to explore how public authority actually works and who, and in whose name, exercise it (Lund 2006). With this, we return to the concept of sovereignty. For what is at stake with plural and ambiguous legal regimes are essentially multiple competing claims to sovereignty. As the Comaroffs (2009) point out, sovereignty links law to power:

..sovereignty as Agamben, Arendt, Bataille and Benjamin understood – is the root construct, the encompassing algorithm, on which the unfolding labile, relationship between law and governance is wrought. How it is exercised, by whom, in what name and with what effect, how it interpellates itself in the state, the market, civil society, faith, identity, even criminality; how it constructs a geography of jurisdiction and a cartography of violence, in these things lie the present of the Brave Neo World, of its social character, of its political life, of its architecture, even of its aesthetics ( p.39).

In the ethnographic literature that explore multiple and overlapping orders of justice and governance, sovereignty figures as situated, partial and contested claims, always reversible, and never secure. This does away with modernist notions of singular, absolute sovereign

power springing from the monarch or the state ‘as the One’ (Bertelsen 2009). <sup>11</sup>As Hansen and Steputat (2006) point out, even in the West, such nation-state sovereignty was always partial, a precarious achievement. Never complete, it was established and sustained through practices that produced the ‘state effect’ (Mitchell 1999). The nation-state as a proclaimed unit of sovereignty was thus a temporal and incomplete accomplishment and is arguably increasingly losing its self-evidence as the sole site of sovereignty, with the “outsourcing” of state functions and increased recognition of “difference” which allows for sub-sovereignty in certain fields ( e.g. religious communities or indigenous communities). Hansen and Steputatt further argue ‘that although effective legal sovereignty is always an unattainable ideal, it is particularly tenuous in many postcolonial societies where sovereign power historically was distributed among many forms of local authority (2006: 205).

Those who explore sovereignty as claims that must constantly be defended against challenges espouse the perspective on power adopted throughout this thesis; the understanding of power and authority as *processual* (Lund 2006). As scholars of Sub-Saharan Africa have noted in the burgeoning ethnographic literature on statehood and authority in that continent, (Lund 2006; Haggmann and Péclard 2010) a view that sees authority as precarious and in need of repetitive performance and affirmation render focus on negotiations and struggle particularly meaningful and important. It is only by close attention to how, in concrete instances, rights, obligations, domains and authority are carved out, renegotiated and enforced that we can we can appreciate the actual, de-facto workings of power.

This analytical stance appears equally appropriate to contemporary Afghanistan where sovereignty and power in general and over specific fields/domains is at least as fragmented and contested as in many Sub-Saharan contexts. This is made abundantly clear by the trajectories of individual cases of gender violence, which might be presided over by a religious cleric, a commander, a *jirga*, a government official or by an international interlocutor, <sup>12</sup> or an individual or collective inhabiting several of these roles simultaneously. This fragmentation of sovereignty is not due to an assumed incomplete modernization (i.e.

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<sup>11</sup>This vision remained influential in the large body of largely ahistorical literature on state failure and state building which posited that instability, violence and economic crisis could be causally explained by the decline of or complete disintegration of ‘the state’ and correspondingly rectified by re-erecting the state and its ‘core functions’ ( See Ghani and Lockhart 2008). For a critique see Heathershaw (2011).

<sup>12</sup>E.g. in the case of Aisha Bibi, who was mutilated by her husband and ended up on the front page of Time magazine, and subsequently brought to the US. See chapter 5.

Afghanistan being located in a Western past; at the beginning of a universal trajectory)<sup>13</sup> but the particular history of Afghanistan, its place in the world, and in history, which have produced an extremely fragmented and contested landscape of sovereigns and modes and techniques of governing.

Historicized approaches to sovereignty also allow for governance and power to operate at multiple levels and to be mediated through a range of different institutions and channels. This lens allows us for instance, to see the post-2001 state building exercise in Afghanistan as an ordering force, that while purportedly working to build a sovereign nation state, in effect actualizes transnational hierarchies in which the decision-making powers of how Afghanistan ought to look like are located in Western capitals and international organizations. At the same time, the economic and political resources flowing from international interventions often constitute opportunities for local actors to exercise and consolidate power in ways unintended by international ‘statebuilders’ (Heathershaw and Lambach 2008; de Guevara 2010; Sharan and Heathershaw 2011). As Heathershaw and Lambach formulate it, sites of international “peacebuilding” interventions ‘have to be understood as ‘fields of power where sovereignty is constantly contested and negotiated among global, elite and local actors.’ (Heathershaw and Lambach 2008: 269). In this vein challenges to and negations of the single sovereign (the nation-state) in “post-conflict” settings and elsewhere are best conceived not as from “below” (local) or “above” (global) but as parallel or alternative alignments which often were transnationally woven. In Afghanistan, Western “experts” and specific NGOs conferred power on “traditional” rulers in a bid to construct an alternative form of rule and authority grounded in what they celebrated as “local traditions and reality”. Parts of the progressive judiciary joined forces with gender activists, aid workers and supporters in foreign embassies to implement the ERAW law. Similarly, the conception of the gender politics of the Taliban government (1996-2001) and insurgents (2001-), as well as the power to execute these policies, were transnationally constituted.

The forms of rule, protection and rights created through such constellations were often ambiguous and indeterminate, characterized by compromise or contradictions. For instance, the establishment of transnational alliances around Afghan women’s rights, while effective in securing funds, new frameworks of protection and forceful mobilization around individual

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<sup>13</sup>Rubin (1995) explicitly take issue with this. He states: the ‘traditionalism’ and ‘localism’ attributed to the Afghan polity, far from being survivals of ancient traditions, are instead the partial result of the particular mode of integration of the country into the contemporary state system. (Rubin cited in Kandiyoti 2007)

cases, also generated new hierarchies and even forms of domination (see chapter 5). Such contradictions, bargains and trade-offs are probably the hallmark of women's activism everywhere, but their specific nature and consequences can only be understood through detailed empirical analysis. Among other things, this requires that we pay attention to the dynamics of transformations set in motion when a specific social domain, problem or process become the object of systematic intervention and regulation. What happens, for instance, when feminism seeks not only to analyse and critique the problem, but to '*devise, pursue and achieve reform to address the problem in the real world?*' (Halley, Kotiswaran et al. 2006: 348 original italics) To answers such questions, we need the analytics of *governmentality*.

#### **IV. Governmental assemblages, and their limits**

As gender violence becomes an object of state (or other bureaucratic) regulation, political questions concerning rights and power tends to be partly or fully transformed into problems of welfare and security, to be solved by technical interventions devised by experts (Grewal 2005). The analytics of *governmentality* (Foucault 2007) draws attention to the particular forms of power that work through the various techniques of institutionalized bureaucracies, or what Tania Murray Li calls 'the practice of government' (Li 2007: 12). These techniques include mapping, surveying, diagnosing and prescribing, in short, techniques that delineates a field and renders it 'governable and administrable' (Dean 1999: 29 ). The effects of such practices are to constitute subjects and to authorize certain experts to guide action and design solutions that can be accommodated within the register of the bureaucratic apparatus itself. These mechanisms typically make gender violence matters of family health and welfare (Mukhopadyay 2007; Standing 2007). Political advocacy becomes "awareness raising" and "sensitization" and is framed in educational and top down fashion rather than as political mobilization, whereas violations become "harmful traditional practices". These transformations are not only visible when the transformation of gender relations becomes a state concern. They are also are evident in transnational and global activist networks and movements, when these become more consolidated, professionalized and starts 'piggybacking on existing forms of power' (Halley, Kotiswaran et al. 2006: 340).

Halley coined the term *governance feminism* to describe ‘the incremental but by now quite noticeable installation of feminists and feminist ideas in actual legal-institutional power.’

This, Halley et. al argue

produces a an fascinating infiltration of specifically *feminist* activism into *generalist* forms of power-wielding The result is the transposition of feminist ideas into specifically not-feminist forms of power’ (p. 343, italics original).

It is within this analytics that the global VAW discourse referred to in the introduction of this thesis must be placed (see introduction, section I). As activism against gender violence moved closer to global centres of power, it also became affected by them and implicated in the reproduction of the hierarchies it encountered. More generally, researchers have examined the consequences of the ‘NGO-ization’ of women’s movements in Southern countries, by which they refer to the process through which, underpinned by international funding and interest, gender activism transforms into transnational institutionalized bureaucratic practice (Jad 2004; 2007; Mojab 2009). The ascendancy of international gender expertise, the establishment of reporting lines and flows of resources constituted modalities whereby Southern women’s welfare and security was to be managed through global governmental practices delivering reform and devising solutions.

At the same time, through the lenses of ethnographic enquiry governmental power, whether enmeshed with feminist or other projects often proves itself much less cohesive, systematic and consequential than what textual analysis of archives, of policy documents and strategies have tended to suggest (Moore 2005). An approach to governmentality as a repertoire of techniques applied historically, rather than as a singular logic, foregrounds how this form of power does not equate a ‘hidden power’ in the sense of a singular will or government conspiracy ( Li 2007). Firstly, a historically grounded analysis reveals how the bureaucratic technologies through which the ‘conduct of conduct’ takes places are not necessarily routed through nation-state institutions but dispersed across various places, such as multilateral organizations, NGOs, corporations and international military forces. Moreover, historical and ethnographic analysis shows the contested and tenuous reach of governmentality. Indeed, Afghanistan reveals unstable expert domains, shifting academic templates and constant redrawing of fields and domains: Certain forms of expert authority were challenged by its supposed “objects” when Kabul-based activists objected to academic claims that informal justice was more appropriate to the Afghan context ( see chapter 6). It was made irrelevant



when Afghan women decided that rather than the insights of UN human rights experts, they needed what they called ‘sharia arguments’ to meet their national adversaries in debate (chapter 4), or when the US army decided that the fine-tuned analysis of local power relations offered by anthropological research was indigestible (or un-implementable) for them as an institution ( chapter 6). The reach of the various bureaucratic machineries shifted constantly as the formal government apparatus and larger aid organizations withdrew from unstable areas, to be replaced by military forces and various local and more discreet NGOs.

To study government interventions historically and ethnographically, scholars have turned to the conceptual tool of assemblages (Moore 2005; Ong and Collier 2005; Li 2007; Mathews 2009). In this, they have wanted to avoid notions of coherent and insulated logics, imageries, and rationalities that travel intact from one setting to the next. Foucault defined his concept of *apparatus* in similar terms, referring to the way in which ‘heterogeneous elements including ‘discourses, institutions, architectural forms, regulatory decisions, laws, administrative measures, scientific statements, philosophical, moral and philanthropic propositions’ are assembled to address an ‘urgent need’ and invested with strategic purpose (Foucault 1980: 194 ). Assemblages allow for historically specific constellations to be conceived and made available for analysis, instead of supposing “state” or family or tribe as competing and monolithic “orders” or logics. Assemblages also leave considerable room for agency. They are not inevitable formations that pop up at certain moments. As Li ( 2007) points out, they require labour.

The analytics of assemblages has also been deployed to destabilize the binary of the national and the global as ‘two mutually exclusive and distinct entities’ (Sassen 2008; Heathershaw 2011). Sassen argues that the concept of assemblages allows us to appreciate that the global can be ‘dressed in the clothes of the national’ (Sassen undated). Rather than an image of national versus supranational sovereignty as a zero-sum game in which ‘globalization’ means the ‘withdrawal of the state at the hands of the global system’ (Sassen 2008: 65) she advocates thinking in terms of specialized orderings; assemblages that produce a standardized, but partial, global domain *through* national institutions. Such partial assemblages might be observed in the development of new jurisdictional geographies (in which the International Criminal Court is one pillar), in the construction of a universal space for the operation of firm and markets, in the formation of a global network of financial centres, or in the transnational networks of ‘global civil society’ (ibid; 64-66). Sassen underlines in her work how national institutional capabilities are reassembled to serve global

projects. This thesis adds another dimension to this by pointing out how, to paraphrase Sassen, the global could also be dressed in the tribal; as the war continued, various Western actors took to reconstituting ‘tribal’ legal forums and increasingly discounting national institutions altogether. As my analysis will show, there was no singular direction or shape to the ways in which global sovereignty was exercised in Afghanistan. Like more localised constellations, transnational sovereign assemblages came into being through contingent struggles and were of an equally temporal and contested nature.

Indeed, forming part of assemblages (but also challenging and contesting them) is also meaning and connection, i.e. articulation (Hall in Li, 2000). By articulation I understand the act of placing oneself, one’s claims and what one is trying to do in a larger story. As Li suggests, articulations are limited and pre-figured by the fields of power or “places of recognition” which others provide (Li 2000). The actors who made claims and counterclaims about interventions into gender violence in Afghanistan formulated and furthered them in various ways. Discursively, they situated themselves and their contentions into a broader picture. They articulated rights, entitlements and obligations with reference to larger political narratives and ideological resources in ways that were meaningful to them and that they thought would resonate with and convince their audiences. Sometimes connections were forged, responsibilities invoked and domains demarcated in novel ways. Even more routine acts of governance were saturated with discursive claims that gave meaning to and placed attempts to govern or “improve” into broader political narratives.

Yet these attempts were not always successful, as their audience often failed to comprehend them or dismissed their arguments outright. As such, discursive strategies and to what extent they gained traction reveal broader and conjunctural fields of power, constituted by historically sedimented practices, established repertoires of meaning and more temporal political alignments. When, for instance women in the Afghan parliament made careful attempts to ground their defence of the ERAW law by referring to sharia, their strategy revealed the enduring prominence of Islamic jurisprudence in the legal landscape of Afghanistan but also the current political dominance of the mujahedin, whose credentials were closely linked to Afghanistan’s foremost identity being Islamic. Similarly, that references to the ‘authentic Afghan traditions’ were increasingly gaining traction amongst Western military and government officials signalled a shift in geopolitical priorities where

costly and time-consuming attempts of bringing Afghanistan up to Western standards of state-building could no longer be sustained. The ability of a local journalist to discredit women's shelters by conjuring images of corrupt and self-serving female activists who invoked the plight of poor women for their own financial benefit reflected an overall disillusion with the aid industry and a scepticism towards 'westernized' women and their foreign allies, all of it given political force by the experience of a prolonged but ineffective external aid and military presence.

Scholars have also pointed out that governmentality can be empowering as new subjectivities are used to articulate new claims. As Matthews (2009) observes:

a key insight of the literature on state making has been to recognize that the relationship between state power and local agency is not a zero sum game and that power can be generative of new understandings of self and of political possibilities. (...) This is paralleled by theories of articulation that find subjects who can then make political claims based on new identities. ( Matthews 2009: 79)

The uncle in Sarepul who called upon the government to imprison the perpetrators of the rape of his niece, exemplifies this. Sayed Noorullah defined himself (more than his niece) as a citizen towards whom the government held certain obligations. As it turned out, the Afghan government proved reluctant to relate to this demand, choosing instead to translate these obligations into a different register whereby the state was taking on the role of adjudicator as if government officials were heading a tribal council.

Often, however, the strategies pursued were not those of making daring public claims, but the calling in of favours, discreet lobbying and personal connections. The Afghan Human Rights Commission, when failing to build up a broad domestic constituency it could mobilize behind human rights, often took to developing close relationships with government officials and the executive so that at least it could extract certain favours.<sup>14</sup> Its international ally, the UN, often chose similarly discreet tactics. When a high ranking government official seemed destined to be acquitted of the rape of a young girl who had fled her family and been under his protection, the UN chose to make a quiet phone call to the local governor rather than any public appeal for justice to be implemented. These discursive and tactical manoeuvres, and the level of their success, thus provide a map of the political and ideological landscape in Afghanistan, and the gender orders herein.

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<sup>14</sup> Interview # 80.

In this chapter I have sought to demonstrate that contestations over and interventions into, violence against women constitute an entry point to deciphering multiple formations of power. Through a discussion of concepts such as sovereignty, assemblages and governmentality, I have suggested what kind of power relations discourses about gender violence can help us understand. Throughout this chapter, I have emphasized the importance of an open-ended approach, one where authority, rule and the technologies of power can never be assumed in advance, but instead is a matter of investigating who actually gets to decide and how. As I started to delve deeper into the processes and events that form the material in chapters 4, 5, 6 and 7 this also seemed the only way to make sense of the ‘field’ of violence against women in Afghanistan. Rather than a singular regime regulating gender violence, what gradually emerged during my research was a multiplicity of quite unstable configurations. The two chapters that follow now provide some contextual depth to the analysis of these temporal sovereign formations. I will describe the political, historical and legal landscapes in which they appeared, and how my efforts to research them proceeded.

## **Chapter 2: Research on shifting ground**

### **I. Introduction**

Afghanistan during the first decade after the fall of Taliban in 2001 was a place of sharp fault lines and cleavages, of constant contest over the criteria through which power, authority and the control over resources could be claimed, and much anxiety about carving out a place in the new order. Moral universes, political repertoires and hierarchies of knowledge and skills were of uncertain validity as old elites and newly assertive groups vied for position. Many Afghans returned from exile; members of the former ruling classes; royalists, old business and landowning families often living in the region and Western-based diasporas armed with academic qualifications or bilingual fluency which were suddenly hugely marketable. They were faced with newly powerful military commanders, and their self-assured young followers both backed up with Western cash and arms, and an Islamic clergy who had seen their unprecedented influence and prestige under the Taliban government turn to dust with the new post-2001 order (Giustozzi 2008). By the middle of the decade, war was regaining pace. Explosions, assassinations and raids fractured everyday life, throwing up uncertainty about the daring declarations of a new beginning and the future shape and direction of the country.

In this chapter I describe the fluidity and unpredictability of my research context and how this reflected on my choice of methodology and on the organization of my field research. I start by laying out the broader backdrop to both my data collection and the events I was researching; the political landscape of the post-2001 decade. I describe the methodological framework I selected and I detail the trajectory of my field work. Finally, I discuss how my presence in the midst of a large military operation and associated aid activities positioned me in particular ways in “the field” and indeed shaped the field of research in peculiar ways too.

## I. Afghanistan during fieldwork: a snap survey of the political landscape

At the time when the main part of the material for this research was gathered; between the summers of 2009 and 2010,<sup>15</sup> Afghanistan was almost ten years into a radical disjuncture set in motion by the attacks in the US on 11<sup>th</sup> September 2001. The US-led military invasion that followed led to a drastic realignment of political forces in the country, until that point almost completely under the control of the Taliban who had established their authority over most of Afghanistan since 1996. When bombing operations failed to remove the Taliban from power, the Western military coalition who launched *Operation Enduring Freedom* relied on the so-called Northern Alliance, a collection of military factions from the Northern parts of Afghanistan, who had their constituencies amongst Northern minority groups, and who had formed a temporary alliance against the Taliban when the latter first emerged in the mid-1990s (Pohly 2002). As a consequence, members of these groupings, in particularly the *Shura-ye Nazar* (‘supervisory council’) dominated by Tajiks from the Panjshir valley, came to feature prominently in the political settlement that emerged (Giustozzi 2009). This was a temporary reversal of the historical dominance of the Pashtuns, whose tribal aristocracy had ruled Afghanistan almost continually until the outbreak of war in 1979, and who had also formed the backbone of the Taliban.

The blueprint for Afghanistan’s new political landscape was drawn up at the Bonn conference in December 2001, where a power-sharing agreement set out a political framework for the transition that was to follow. In an attempt to broaden the base of the settlement beyond the Northern Alliance, the chief intervening power, the US, sought to install a Pashtun head of state, in the form of Hamid Karzai, who belonged to the Pashtun aristocracy and diaspora. Almost completely absent in the new coalition were members of the Taliban, mostly Pashtuns, but from different social backgrounds than the Pashtun aristocracy and traditional ruling class (Dorransoro 2012).

The new order was of course in turn heavily shaped by an expanding international presence, on which the Karzai government was dependent both militarily and financially. Initially, Western military operations were focused on capturing and killing members of Al Qaida and the Taliban who had melted away or fled. The US had mobilized a number of its NATO allies, who gradually employed military troops across the country, some aiding the US hunt

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<sup>15</sup> I arrived in Kabul in July 2009 for my fieldwork and lived there until September 2010. I returned for a brief visit in May 2011 and again spent three months in the city writing in the spring of 2012.

for Taliban and Al Qaida, others forming part of an UN-mandated peacekeeping force, the International Security Assistance Force (ISAF). The European participation in the mission, whilst mostly driven by the wishes of European capitals to reiterate their military and political partnership with the US, meant that what had started as a US desire to actualize regime change without getting bogged down in 'nation-building' (Chesterman 2004) progressively expanded into a larger presence engaged in attempts to effect political and economic transformations under the banner of 'statebuilding'. Whereas the US administration had invoked the plight of the Afghan population, particularly Afghan women, as a justification for the invasion (see below), it was mostly the Europeans and the UN who focused their efforts on economic and social reconstruction, at least initially. As Suhrke points out, the international 'project' in Afghanistan contained within it tensions and contradictions from the outset (2011). The focus on capturing military adversaries led to alliances with armed commanders and so-called strong men, alliances which ran counter to attempts to centralize the means of coercion and build a unified state. Pledges towards human rights, anti-corruption and 'good governance' targets often had to cede ground to the objectives of political stabilization and intelligence gathering.

President Karzai, who first appeared as an isolated leader dependent on foreign support, gradually consolidated a substantial power base, eventually confirming his dominance of Afghan politics by his re-election as president in 2009. When he was first installed as an interim leader in 2001 Karzai had no influence over the countryside beyond his home area in the South. The state institutions, in particularly the security apparatus, were dominated by networks linked to the Northern Alliance (Frost, 2009). At the Bonn conference, members of the *Shura -ye Nazar* had obtained three key ministries; Defence, Interior and Foreign Affairs, as well as control over the intelligence services (Dorrnsoro, 2005: 329).

However, the 2004 Constitution, which created strong presidential powers, was a victory for Karzai. The issue had been bitterly contested, with representatives of minority groups, the Uzbeks, Hazaras and Tajiks wanting a parliamentary system with stronger checks on executive power and central state power more generally, both historically Pashtun domains (Rubin 2004). With support from the US administration, who wanted to see a strong executive, (Suhrke 2011: 163) the presidential system prevailed. Equipped with this significant means to expand and consolidate his power, Karzai set out to gradually displace the dominance of the Uzbek and Tajik networks in the central state apparatus. In their place he installed a number of other groups; Western-educated Pashtun ministers, religious

conservatives, family loyalists, and members of *Hizb-e Islami* ('the party of Islam') – one of the former jihadi parties headed by Gulbuddin Hekmatyar – with many Pashtun, university-educated people with NGO backgrounds amongst its party cadre, and then selectively reached out to members of the Northern Alliance as the latter increasingly fragmented. As the Northern Alliance gradually lost positions in the government and state bodies, many gravitated towards the opposition and in 2007 formed an official opposition group, the United Front. The name proved a misnomer, as membership fluctuated and factions were intermittently brought into the camp of the president. However by the latter end of the decade, political fronts had coalesced into an executive whose allies were predominantly family and kinship connections of the president, new businessmen and a select number of former commanders, and a Northern dominated opposition in Parliament which centred around members of the Tajik Speaker of Parliament Yusuf Qanooni, and Dr Abdullah, Karzai's chief challenger in the 2009 presidential election.

As Giustozzi writes, Karzai in expanding his power was 'not so much interested in institution building, as in the centralisation of patronage' (Giustozzi 2009: 96). He and his family largely followed a kingly recipe of equating the expansion of state power with that of increased influence of the ruler and his inner circle (Forsberg 2010: 21). No group was allowed to become too strong or too independent from the government. The government's (or Karzai's) tenuous control over the countryside was achieved through a series of deals and accommodations with local power holders, many of whom had entrenched their position as military strongmen in the immediate post-2001 period, often with the backing of international military forces. Karzai proved reluctant to challenge these men directly, instead gradually attempting to weaken them, by carefully appointing and rotating government officials according to political loyalty, or by installing technocrats with little hope of challenging former commanders who wielded the real power at the local level (see for instance Giustozzi and Ullah 2007).

In retrospect, 2006 appears as something of a watershed when it came to the international construction of a new order in Afghanistan. Before this, the notion that Afghanistan was on a linear path towards development and stability with a government supportive of human rights, gender equality and Western interests could still be presented with some plausibility to most audiences. However, by late 2006, insurgent attacks were causing alarm amongst internationals and Afghans alike. The Taliban had quietly regrouped and grown steadily but often unnoticed since NATO had proclaimed victory in 2001 (Giustozzi 2008). By 2006, they



had spread across the southern half of the Afghanistan launching increasingly daring attacks (ibid.). A riot in Kabul the same year, which saw a number of Western aid organizations attacked, shook NATO countries and reportedly also Karzai, who increasingly came to believe that he was too dependent on a foreign military presence whose ultimate fate was uncertain and that he needed a constituency of his own (Rubin 2009).

In the years that followed, Karzai repeatedly clashed with Western embassies and officials over appointments and policies as he moved to strengthen his own powerbase. The technocrats favoured by Western donors, and who had often professed an ambitious reform agenda targeting nepotism and corruption, lost ground to more political actors, particularly members of *Hizb-e Islami* and Northern power brokers. The expansion of ISAF forces to the South of Afghanistan also brought tensions to the relationship between the Afghan president and his foreign allies. Karzai strongly condemned the civilian casualties caused by NATO military operations and resented what he saw as NATO countries' tendency to override his wishes and infringe upon the country's sovereignty.

By the latter half of the decade, Afghanistan's nascent human rights community and their international supporters had also grown more disillusioned. Already in 2001 protestations had been voiced against the Bonn agreement's rehabilitation of the mujahedin – political actors who had committed serious crimes, especially during the civil war of 1992-95. At the same time, various mechanisms to promote human rights were established. Chief amongst these was the Afghan Independent Human Right Commission (AIHRC), which was constitutionally mandated and set up a nationwide structure. The commission focused much of its efforts on the prosecution of war crimes, which given the dominance of war criminals in the post-2001 order, also amounted to an attempt to turn around the political status quo. These attempts received a serious blow in 2007, when a number of former military commanders, most of them with mujahedin backgrounds and since 2005 members of parliament, put forward a law that would grant them amnesty from prosecution of war crimes. Although the status of the law was somewhat unclear, those who had bought into ideas of a new order based on human rights saw the law as a definite proof of the government's real powerbase and the mute protests from Western embassies as evidence of the hollowness of Western pledges towards supporting a human rights agenda in the country (Suhrke, 2011: 174).

The episode also illustrated in stark terms that the mujahedin had solidified as a powerful political bloc. These were actors who had originally risen to power as a result of the cold war

rivalry playing out in Afghanistan after the Soviet Union invaded in 1979 to prop up a faltering communist government. Western countries, Saudi Arabia and Pakistan quickly stepped up their support to the resistance, which coalesced under the banner of jihad (Dorrnsoro 2005:105), with its fighters calling themselves mujahedin. The mujahedin groups were since discredited in the eyes of much of the Afghan population by their failure to establish order after the collapse of the Soviet-backed government, descending instead into infighting, chaos, and banditry, developments that in turn paved the way for the Taliban government. However the fate of the mujahedin leaders would yet again change with geopolitical developments. Being enlisted in the US overthrow of the Taliban government gave these actors an opportunity to restore their credentials and positions. The Bonn agreement in December 2001 reflected the mujahedin's newfound power and was an early indicator that participation in the jihad against the Soviets would once again constitute a key mark of legitimacy. The preface of the agreement stated:

*Expressing* their appreciation to the Afghan mujahidin who, over the years, have defended the independence, territorial integrity and national unity of the country and have played a major role in the struggle against terrorism and oppression, and whose sacrifice has now made them both heroes of jihad and champions of peace, stability and reconstruction of their beloved homeland, Afghanistan,

The rehabilitation of the mujahedin was perhaps a predictable outcome in a situation where the West, looking for allies inside the country could not readily engage with former communists whose demise they had energetically sponsored only a decade earlier. The choice of these actors as allies were also grounded in their ability to exercise coercive power and earlier relations established with them during the resistance years. Their rehabilitation contributed to an ideological field where the defence of nation and religion was rendered synonymous, where the mujahedin could stake out a claim to superiority by virtue of their status as national liberators, whereas an openly secular orientation was tantamount to treason. As expressed in a widely-cited warning uttered by Abdul Rasool Sayyaf, a former commander of one of the mujahedin parties, during a rally against the amnesty law: *'Whoever is against the mujahedin is against Islam and they are the enemies of this country'*.

The presidential elections in July 2009 confirmed Karzai's dominance of the political landscape (at least in the areas not dominated by insurgents), and a growing rift between the president and his Western allies, in particular the US. In the run up to the elections, Karzai had reached out to an expanding circle of old guard mujahedin and militia commanders in

attempts to build a nationwide political alliance and split the opposition. To the particular consternation of human rights advocates, Marshal Fahim of the *Shura-ye Nazar*, a Panshiri commander notorious for his abuses of power, was brought back as the vice-presidential candidate. The Obama administration had since its inauguration made no secret of its scepticism towards Karzai, and the relationship between the two countries deteriorated as the Afghan president perceived the new US administration as intent on displacing him. The 2009 election was marred by large scale fraud and insecurity and the NATO alliance was now faced with the choice of publically compromising their own standards by endorsing a dubious electoral outcome, or unsettling its entire mission. Unsurprisingly, after some manoeuvring, the former option prevailed and the alliance continued its uneasy relationship with Karzai, who had taken great offense at suggestions that a large share of his votes were fraudulent.

When the Obama administration took over office in 2009, it was also evident that the NATO-led military coalition was in obvious trouble. Attacks, primarily against coalition and Afghan forces and government officials, had risen yearly, and by the summer 2009 more than half the country, and three out of the four main roads out of the capital were considered no-go areas for foreign aid workers. The US Defence Department was arguing for an expanded military operation, (referred to as a “surge”), accompanied by higher levels of development aid to underwrite the military campaign. Others in Washington argued for a smaller US military presence and a reduction of stated aims in Afghanistan – the abandonment of broader goals of development and statebuilding. The outcome was a compromise, which gave the military much of its troop expansion, but on a limited time scale, with the US President declaring that he wanted to start troop withdrawals after two years, in July 2011. The military escalation took place under a particular counterinsurgency doctrine (see chapter 6), which called for all aspects of the international activities to be brought to support military efforts. As a result international, and in particular US aid assistance was increasingly put in the service of a security agenda of stabilization and political outreach.

With security deteriorating, calls for peace negotiations with the Taliban gathered force. By 2010, although actual prospects of negotiations were still uncertain, these calls nevertheless were causing discernible disquiet, particularly within three groups; the US military, women activists and ethnic minorities. The former did not want to see their military operation and professional prestige truncated by a political settlement, whereas amongst women activists and their supporters abroad there were concerns that legislative gains and improvements in women’s position more generally would be reversed should the Taliban be brought into the

government. Arguably, the most vocal opposition to negotiations came from minority groups and their leaders, demonstrating that the historical tension between the Pashtuns and the Northern minority groups remained a significant political fault line. Protests from this group were reinvigorated by the president's frequent invitations to the Taliban to join the government. While these overtures largely appeared as impulsive political posturing, they nevertheless gave ammunition to a political narrative which saw a Karzai rapprochement with the Taliban as a plot to re-establish the central state as a Pashtun-dominated apparatus subjugating other groups.

By the end of the first decade of the new millennium, the attempts to forge a new order in Afghanistan on the back of the 2001 military invasion appeared to be unravelling. The writ of the government was shrinking, military and civilian casualties were increasing, and faith in the internationally sponsored state-building agenda was dwindling. Afghan government officials and their Western counterparts became locked in an increasingly acrimonious exchange about the allocation of blame for this state of affairs. Many in the Afghan government were furious at what they saw as foreign arrogance and lack of regard for Afghan civilian lives, frequently victims of coalition military operations. There was also considerable unhappiness with external attempts to intervene in official appointments, which undermined political alliances devised at the presidential palace. The Obama administration, or at least parts of it,<sup>16</sup> had initially launched a frontal attack on government corruption, which was seen in some quarters as a major cause of the difficulties besetting the international mission. A number of high profile prosecutions and special task forces were launched through American pressure, only to be derailed or blocked by the president's office. The country's burgeoning opium production was another obstacle to reform; since the early days of the Karzai administration, the government had been infiltrated at all levels by the narcotics trade (Goodhand 2008; Schweich 2008).

As international frustrations grew, there were calls for the abandonment of earlier professed goals of institution building, democratization and development. Other NATO countries gradually scaled down, leaving the alliance increasingly US-dominated. It was posited that Afghan culture and society were inherently unsuitable to "Western" institutions of governance, an argument that also absolved the West of any responsibility. The military in particular, experimented with "traditional" institutions, but, perhaps more significantly in the

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<sup>16</sup> Some of those tasked with political reconciliation reportedly saw anti-corruption as an obstacle to their work. Personal communication, Astri Suhrke.

winter of 2009-2010, in an anxious bid to turn the situation around, started a large scale targeted assassination programme which aimed to step up efforts to ‘kill or capture’ mid-level Taliban commanders (Clark 2010). US Special Forces deployed in large numbers also to the North, where in the summer of 2010, the security situation deteriorated considerably.

As this sketch indicates, Afghanistan in mid-2009, when I was intending to start my fieldwork, promised to be a turbulent context for research. And indeed, I would often get the feeling, like many of my informants, that the universe we were inhabiting was one from under which the rug could be pulled at any moment. When planning my field research it was therefore evident that this would not be an appropriate setting for bounded ethnography of the type in which much time is spent developing intimate relationships with a small group of people in a small locality. Instead, I was preparing for “mobile ethnography”; to track down processes as they moved from one setting to the next, to identify and gather material for various episodes of gender violence, and to include media debates and other publically available material, in the event that I should suddenly have to leave. As I elaborate on below, my choice of methodological framework was partly influenced by the intention to employ such tactics.

## **II. The extended case method**

The methodology used in this research draws upon the extended case method. The extended case method (or situational analysis) was first developed by the so-called Manchester School of anthropology (Mitchell 1956; Velsen 1964; Gluckman 1965; Burawoy and Verdery 1999; Burawoy 2000; Evens and Handelman 2005). The method uses a case (an event, a process) as a way of casting light upon that particular society or more accurately; the social relations that are actualized in a particular context. The extended case method thus sees a case not as a means to prove a general theory (for instance the existence of a causal law) or as a way of understanding a particular bounded phenomenon. Instead, a case is a departure point from which one can “extend out”; bring social relations into view and available for analysis. This method is (at least in the view of some of the later proponents of the method<sup>17</sup>) inseparable

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<sup>17</sup> The approach emerged out of structural-functionalism, and were initially based on the assumption that cases could be revealing or expressive of ‘society’ or ‘culture’ thus supposing the existence of society or structure. Later, however, students of the extended case method viewed events and organizations as shaped by, rather than expressive of social relations and practices. ( Burawoy 1991).

from a particular ontological and epistemological perspective which rejects a dualistic distinction between actor and structure, object and subject – a perspective that also resonates with feminist methodology (Roberts 1981; Stanley 1990). Thus, there is no such thing as an underlying structure or truth that can somehow be accessed through data. Instead, the method is concerned with ‘axes of practice in particular contexts’ (Handelman 2005: 97). Whilst temporal, such practices are not arbitrary, but shaped, constrained and enabled by previous practices, many with a degree of durability. In the extended case method, the validity of case studies is not based on the typicality of the cases – but on the validity of the analysis, more specifically the extent to which the analysis establishes a plausible account about the ways in which things hang together i.e. what made the event possible.<sup>18</sup>

I found this methodology appealing for both analytical and practical reasons. On an analytical level, its objective of bringing social practices available for analysis through detailed examination of concrete events resonated with my approach to contestations over gender violence as windows into relations of gender, governance and politics (see chapter 1). Moreover, the extended case method provides a lens that can capture the transnational dimension of local practices. At a time when ethnography was often preoccupied with unearthing the underlying structure of what was assumed to be self-contained communities, the Manchester school anthropologists distinguished themselves from their contemporaries by looking at events as not just locally, but also globally constituted. As Burawoy expresses it; ‘there never was any isolated tribe here!’ (Burawoy 2000: 16) Proceeding from the notion that gender violence in Afghanistan are governed by historically specific assemblages with both local and transnational dimensions (see chapter 1, section IV), I needed a methodological framework allowing me to dissect these. The extended case method, asking what *made an event possible* provided such a tool.

The extended case method also had attractions of a more practical nature. Its methodological script was to follow events over time from one setting to another. In the description of the Manchester school by Burawoy (2000: 17 ) ‘The mancumians (...) followed cases of kinship factions, succession struggles, property disputes, over extended periods of time and from one setting to the next.’ This kind of methodological strategy allowed me some flexibility

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<sup>18</sup> In this sense, the extended case method has much in common with Foucault’s genealogical inquiry, which is also a method. Foucault, similarly to the proponents of situational analysis, rejected a search for causes, or structuralism. According to Hunt and Wickham, Foucault’s genealogical enquiry manifests a commitment to the specificity or uniqueness of historical phenomenon, it is for this reason he insists on the ‘event’ Hunt, A. and G. Wickham (1994). Foucault and law: towards a sociology of law as governance. London, Pluto.p. 6.

regarding sources. Given the unstable situation in Afghanistan, and the potentially sensitive nature of my research topic, it was difficult to make definitive plans about research sites and the type of material that I would collect. By focusing on events there were potentially many different types of material I could use; interviews, media transcripts, observation in situ and various written documents such as laws, policy strategies and emails. These could be accessed through various routes and from different locations and did not require me to spend a set amount of time at a specific field site. If necessary, I could even gather material from abroad.

As it turned out the situation in Afghanistan remained stable enough to allow me to complete my fieldwork there and I did not have to retract into data collection from a distance. My interest in contestations over gender violence for what they would reveal about gender relations, governance and sovereignty led me to document, in as much detail as possible, the various processes that followed claims over episodes of gender violence, as these processes moved from one setting to the next, from the initial incident, to the attempts to report it to authorities, or, attempts by authorities to impose their authority over such acts, to debates about them in the media, to how events were recounted, contextualized and decided over in court, to the involvement of activists, aid workers and human rights officials in trying to shape outcomes in particular ways. I retraced processes by obtaining retrospective accounts of events that had often started before I arrived and continued afterwards, by interviewing participants and observers, reading minutes of meetings, court documents ( although these seldom existed) , and media reports.

I started out with concrete episodes of gender violence ( chapter 7) but soon expanded my material to include contestations over legal reform, ( chapter 4) debates about women's shelters ( chapter 5) and attempts to promote informal justice which seemed to run counter to initial efforts to meet the criteria of international standard setting instruments such as CEDAW ( chapter 6). I retraced these processes and attempted to place the political strategies and discursive claims at play within broader repertoires, institutional and social practices and political narratives. Below I chronicle this "event reconstruction" as it unfolded.

### **III. Doing research in Afghanistan: Research trajectories, data access and ethics**

I arrived in Kabul for my fieldwork in the summer of 2009. Although I had made brief visits earlier, this was my first long-time stay in the country. As I settled temporarily in a

guesthouse, catering to Afghans from other parts of the country and the shrinking number of foreigners who were not already under rigid security restrictions, I slowly took a step at a time to explore how I could best carry out meaningful research. It was just before the 2009 presidential elections and feelings of unpredictability and insecurity were intensifying. Although there were relatively few unattached researchers in Kabul at the time, the city was awash with foreign aid workers, consultants, entrepreneurs, journalists and of course military personnel and diplomats. It was somewhat unusual to move around as freely as I did and to arrive at the fortified outer security gates on foot or dropped off in a Toyota Corolla, but nonetheless, to many of my informants, both local and international, I was just another Western woman interested in the condition of Afghan women, an identity I often was comfortable to assume as it downplayed the more political aspects of my research topic. I hired the husband of one of the guesthouse staff as my part time driver, and he took me around the capital's stifling traffic jams, progressively exacerbated by the many security related road blocks around the city. The amount of time I spent in the car around the city, observing people, conversing with my driver and trying to follow the radio news could often equal the time I spent gathering material in a day. Our trips were occasionally fractured by the sound of the explosions and attacks that were visited upon the city from time to time, and added to the inhabitants' frayed nerves.

The first months of my fieldwork were spent trying to improve my language skills, and visiting the organisations and persons I thought would be most able and willing to expand my knowledge of how cases of gender violence typically encountered the legal system and how they travelled through it. Through these efforts I hoped I would eventually be able to identify the cases of gender violence that would serve as the cornerstone of my material. In particular, I had thought that UN organisations in the human rights field might prove a useful entry to cases that I could study, but these often proved reluctant to discuss concrete events. There were good reasons for this. Much of the human rights community was shaken by the recent murder of the husband of the victim of a high profile rape case. In a horrifying ordeal, his wife had been sexually abused and made to walk semi-naked through her village after questioning a local commander and government ally about the disappearance of her son. Although the perpetrators had been convicted, two of them were since freed through a presidential pardon. The woman and her husband went to Kabul to pursue the case, and the UN's human rights section had played an important role in the public uproar that followed, and which had forced the president to review the pardon. However the case took another



sinister turn when the husband was murdered and the human rights section of the UN realised it was becoming increasingly marginalised in a political climate where both internally in the UN mission and externally, realpolitik increasingly overrode accountability and legal procedures. In such a situation, it was not surprising that they were reluctant to share information.

At the time, I was also working on a short research project focusing on the negotiations between internationals and locals in justice sector reform.<sup>19</sup> My colleagues and I had chosen as our cases the negotiations over two laws which preoccupied the women activists in Kabul, the Shia personal status law and the EVAW law. The Shia law, as it was widely referred to, had created an uproar amongst many women activists and politicians, as well as Western embassies and public opinion when it was ratified by the president in March 2009. Presented as a recognition of the Shia minority's right to adjudicate according to the sect's jurisprudence, the law contained what many felt was an excessive codification of personal life and in many ways represented a rolling back of the rights in the existing Civil Code and certainly reversed the momentum in women's rights since the 2001 invasion. Despite protests both in Afghanistan and abroad, the law (with many of its problematic provisions remaining) was again signed into decree by the president on 19<sup>th</sup> July 2009, and this setback was the subject of heated debate at a meeting of Kabul-based women's activists, both Afghan and foreign, which was called in response a few days later and which I observed.

The discussions and atmosphere at the meeting appeared to reveal a 'movement' fractured by diverging discursive reference points, by multiple modes of organising and ideas of advocacy or lobbying and by parallel reporting lines and constituencies. Most striking however was the confusion and uncertainty regarding the legal framework. The participants at the meeting were trying to establish which law took precedence; the Constitution, the existing Civil Code, the newly decreed Shia law, or the EVAW law which had been signed by the president on the same day. These laws contained contradictory implications for, amongst other things, restriction on polygamy and marriage age. It took me some time to realise that the confusion I witnessed was not due to lack of preparation or time pressure, but reflected two important aspects of the post-2001 legal reform process; opaqueness in the processes through which

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<sup>19</sup> Entitled *Everyday Peacebuilding*, the project was funded by the Norwegian Ministry of Foreign Affairs. It compared negotiations over justice sector reform in four countries; Liberia, Sudan, Haiti and Afghanistan ( See Sending 2010).

laws were drafted, promulgated and ratified, and contradictions within the rapidly proliferating legal framework itself.

The EVAW law, which many of the activists pinned their hopes on, enumerated 22 crimes as violence against women and stipulated their punishments and outlined government responsibility (see chapter 4). While I had initially planned to make a few cases of gender violence the basis of the material for my PhD, the ‘real time’ negotiations over a significant attempt to transform state intervention into gender violence constituted a major research opportunity. Having done some research on this law for the project mentioned above, I decided to continue to follow it for my PhD research, examining in more detail the efforts, alliances and rationales behind its drafting and subsequent promotion, and to see how its fate would evolve over the next year.

At this point, the law was about to be introduced for ratification in parliament. With my Afghan colleague, I attended the initial debates in the joint committee meetings in parliament where the law was being debated. This required considerable effort, and the help and goodwill of many MPs. Parliamentary debates were generally not transcribed, not even plenary debates and the proceedings of the joint committee were certainly not. In order to be present in these discussions we were dependent on MPs to sign us in as visitors, and equally crucially – to inform us when and where the meetings would be scheduled. Often, meetings were called at the last minute, as a deliberate strategy to ensure that the certain people were there (and certain others not). There was always a chance that we could be told to leave the room. Although MPs had the opportunity to invite guests and many of them did, this sometimes led to controversies when these attendees intervened in discussions. Although the parliamentary process was eventually abandoned (see chapter 4), I continued to follow the EVAW law by attending various conferences in which it was debated, and seeing how it entered the agenda of the numerous workshops and training courses that made up the extensive network of donor driven gender activism (Kandiyoti, 2009), which was by then fairly institutionalised in the country.

Meanwhile I found a very useful source of information in a handful of legal aid organisations whose staff generously shared information about how they worked on incidents of violence against women and the typical trajectories of such cases from police investigations through to court. They also alerted me to cases they themselves thought were significant or interesting and I started to follow these up. At this point, I had been equipped a research assistant. Fluent

in both Dari and Pashto, with a background in religious studies and in his final year of a law degree at Kabul university, Jawad would prove indispensable as we set out to retrace the trajectories of a few episodes of gender violence. In pursuit of this, we travelled, certainly not across the country, but to a good portion of the provinces that were still considered stable enough for us to visit. For two of the cases I eventually decided to include, however, which were from two districts out of reach for me and mostly also for Jawad, I eventually sought the help of two local researchers who carried out some of the interviews. The material they gathered was then crosschecked and supplemented by other interviews, largely by phone, to local government officials, journalists and others.

Doing research in ‘official’ Afghanistan was not straight forward. My efforts to contact various judicial institutions, such as the Supreme Court, in order to attain statistics on convictions and similar documentation led nowhere. Court documents were generally not made available to the public and often was little more than loose notes in an official’s drawer, if they existed at all. It often appeared that information was a resource to be carefully guarded and only given away in a mutually beneficial transaction, whether in the form of other information, or promises of future favours. On the other hand, many people were extremely generous with their time and often agreed to multiple interviews. However, given that I sought to speak to very specific individuals due to their connection to a particular case or process, ranging from families, journalists, legal and government officials, aid workers, and politicians, many of whom were very busy, it sometimes took weeks, even months and long chains of introductions to set up a particular interview. Appointments could be repeatedly cancelled, especially when explosions, attacks or security threats temporarily closed down government buildings, led to road closures or resulted in staff in international organizations being ordered to observe several days of lock down. Some people declined to meet altogether, especially certain high ranking government officials. But my disappointment was probably biggest, when I after having successfully obtained the multiple permits required by the Ministry of Justice, and found a Pashto-speaking woman sensitive enough to interview a deeply traumatised woman and also willing to risk the stigma of coming with me to the female prison, my request for a meeting with a young girl at the centre of a case was declined. In fact, none of the women at the centre of these cases, discussed in chapter 7, were interviewed. Two of them were dead, one, a teenager had married and her family asked me to respect her (or their) wishes for privacy, and the last one, who I glimpsed through the doorway in the prison, refused to talk for reasons I do not know. Instead, it is the stories, often

contradictory and certainly disputed, narrated by those around them that form the web of information that constituted the material for my analysis. The focus of the interviews was to try to reconstruct particular events retrospectively, to establish what had taken place and what had been said. These recounts of what had happened were narrated by various informants and therefore shaped by their particular view of it, but because data was triangulated through the interviewing of multiple informants, it was possible to establish some kind of chronology of events, (the sequence of what had happened and what was said), as well as the multiple readings of the events, (accounts of what was contested and what was generally agreed upon or universally approved).

A stay in the city of Herat, after some months of fieldwork alerted me to the manoeuvring exercised by women's shelters, a new institution in Afghanistan. The shelters, which provided temporary accommodation for women who for various reasons could not or did not want to live with their families, were under constant scrutiny for allegedly undermining the family and morality by positively encouraging women to leave their families and husbands. For women to live in non-familial settings, except for arrangements institutions like university dormitories, was generally unheard of in Afghanistan. These shelters were therefore quite a radical development. However, because adultery is criminalized in Afghanistan the shelters were not only facing the outrage of conservative groups. They also faced the dilemma of being accused of sheltering criminals. In Herat, I was informed that on this basis, that women who could *not* prove that they had *not* committed adultery i.e. women who had not come directly from their family homes to the shelters or government authorities, perhaps having spent a few nights with more distant relatives, would not be admitted to the shelter in the city. Attempts on my part to find out whether this was a universal policy amongst the dozen or so shelters across the country led to probes into them as institutions, in turn revealing how they operated in a curious transnational space, navigating between international support and local scepticism. Some months after my departure from Afghanistan, a controversy erupted that brought these tensions into sharp relief. The Minister of Women's Affairs declared her intention to put all shelters, currently run by NGOs, under government control, and to establish committees at the provincial level to decide whether women were qualified to enter the shelters. The NGOs and women's activists who ran the shelters, outraged by what they saw as government encroachment on their territory, with severe consequences for women's protection, protested. During a short visit to Kabul in May 2011 I attempted to retrace this latest chapter in the ongoing controversy around the shelters. By then, a well organised

campaign carried out by Afghan activists and international supporters had succeeded in reversing the Minister's decision and it appeared as if the shelters would be able to continue their tenuous existence for the time being.

A considerable portion of my material was gathered through interviews and conversation with members of the foreign aid and diplomatic community in Kabul and beyond. They were important actors in many of the processes that I examined, and even when they were not directly involved, they often had useful insights and information that they were willing to share. Thus, the 'field' that I often found myself traversing was one also inhabited by aid workers, embassy personnel and other researchers. It quickly emerged that there existed one particular discursive repertoire amongst this community, centred around invoking "the Afghan perspective", the need to be context specific and to be "Afghan-led". Not only were many foreigners in Kabul frequently legitimising their actions and arguments with reference to these tropes, but they were often also successfully evoked by Afghans in their interactions with foreigners, in particular in the numerous formalised settings and occasions where members of local elites had been invited to "speak" to an international audience. It is not my intention to question the sincerity of many of these actors, whether local or international. To me, what was of interest was the origins and effects of this discourse .

It occurred to me that this strong valorisation of the specific, the contextual and the local was different from what I had encountered in other "intervention sites" which I had earlier visited, briefly, in West Africa. Invoking the Liberian, or the Sierra Leonean perspective would not have generated the same instant, almost self-evident claim to legitimacy. Instead, as Autesserre (Autesserre 2011) observes, the expertise valorised in most "peacebuilding" settings is technical and generic knowledge, not cultural and specific. In contrast, what was evidently afforded respect in the expat community in Afghanistan was not the number of previous deployments in peacebuilding missions but time spent in Afghanistan, in particular outside the capital and in rural and insecure areas, knowledge of local languages and local contacts.

I believe that this difference in discursive and professional hierarchy was rooted in the particular history of Afghan-foreign relations. The intense, but intermittent geopolitical interest and activity in Afghanistan had produced a significant cadre of Western "experts" on the country, who resided in Kabul or returned to the country again and again. Moreover, the history of Western intervention in Afghanistan had often entailed an antagonistic or

ambiguous relationship with central Afghan authorities. Often, instead of relating to the central government, Western players would establish relations with local power holders (whether tribal leaders or mujahedin commanders), reinforcing notions of Afghanistan as a country somehow defined by its alterity, its particular local traditions and its ungovernability. As the value and legitimacy of the NATO operation was increasingly questioned by Afghan politicians and the population more generally, it became even more imperative to emphasise and seek for ‘Afghan’ solutions. It was a common assertion in the circles of foreign expats and their local counterparts that whatever difficulties the international mission in Afghanistan found itself in, these could be explained not by the lack of expertise per se, but by a deficient grasp of Afghanistan, of local opinion, culture and reality. This assumption was institutionalized in the proliferation of research and programmatic activity proceeding from a need to render knowable and to work with local reality and culture, rather than to ‘impose’ external solutions. What was deeply ironic about the entire endeavour was the fact that this intense interest in Afghan solutions was propelled by the Western intervention itself.

While reflections about this discourse was playing at the back of my mind, what prompted me to study it further was the gradual realisation that this particular discourse and the institutional practices emanating from it were discernible in the ‘field’ that I was studying, namely interventions into gender violence. One NGO involved in legal aid to gender violence victims explained how they preferred to work with customary justice processes to solve difficult cases of abuses against women. Moreover, an Afghan human rights official alerted me to the concerted efforts that were underway to extend formal recognition to these customary justice processes, in deference to the established necessity of adjusting policy to Afghan reality and culture. She protested that the image of Afghanistan invoked by the Western academics who advocated for this formal recognition was outdated and undermined the struggle for women’s rights that she and other Afghan progressive actors were engaged in. At that point, I decided to trace the genealogy of the attempts to strengthen informal justice in more detail, and in chapter 6 I argue that they reveal an alternative form of governance in Afghanistan, which deployed a radically different expert regime, subject positions and sovereignty than did the alliances behind the EVAW law and the shelters.

However, as a researcher in the midst of, and to a certain extent operating on the back of, the Western military operation in Afghanistan I was of course myself also implicated in this knowledge-intervention nexus. As a citizen of a country (Norway) whose troops were operating around the country, I was acutely aware of my status as, formally, a party to the

conflict in Afghanistan. There were some practical constraints. I decided that my ideal scenario, settling long term with an Afghan family could in a situation like this have jeopardised their security as well as mine. Instead I lived for most of my fieldwork in a shared house with Western journalists.

Given the unstable fieldwork context I decided to err on the side of caution in relation to my informants and my material. This was most important for the four cases that I examine in chapter 6, since they concerned ‘private’ processes; personal life and family conflicts. Here I have anonymized all my informants, apart from higher ranking officials and one other informant who had already approached media on his own initiative and was eager for me to quote him directly. Writing about these cases, I also took care to not divulge personal information which had not already entered public domains when this could be linked to identifiable individuals. In one case, which had received comparatively little media attention in Afghanistan I decided to keep the locality and other details undisclosed, using pseudonyms throughout.

Other material was related to semi-official processes; contestations around legal frameworks and infrastructure. Informants were interviewed based on their professional role; they were not asked questions related to their personal and family life. Therefore, I set a higher threshold for omitting material, mainly doing so only when informants specifically told me not to include something. I have also not shied away from describing the informal alliances evident in many of the processes I analyse, since this was not in any way secret information in Afghanistan. While the support given to Afghan women rights advocates by Western countries were controversial amongst conservatives in Afghanistan, the close working relationship between some women activists and Western diplomats was well known in Kabul. Many of my informants had received awards or scholarships from NATO governments, and were often observed at public events either held at Western embassies or publically sponsored by them, and at functions abroad. For instance, the contact between shelter staff and the US embassy that I describe in chapter 5 was already known to the journalist whose denunciations of such linkages are at the centre of one of the sections in this chapter. Therefore I have not determined it to be problematic to detail these processes to the degree that this thesis does. Nonetheless, since the situation in Afghanistan seems poised to remain unsettled, I have decided to anonymize some of my Afghan informants as an additional measure of protecting my research participants.

The political context in which the field work took place also had other implications. Whereas, at the time of writing, Afghanistan appeared to be fading into the background of the international agenda, in 2009, the country occupied a prominent place as the major foreign policy agenda of many Western countries. The Obama administration were coming to terms with the fact that they had inherited a costly and yet deteriorating war, and launched reinvigorated efforts to ‘understand’ Afghanistan and the conflict. Western media interest in the country was intense, and research reports and commentary were produced in abundance.

The Western intervention positioned me in relation to my research focus, “the field” and my informants in several ways. Firstly, it was often an implicit understanding that I was part of a research community whose ‘field’ was Afghanistan out there – beyond the offices, embassies, and small number of restaurants and cafes in which members of the expat community and small numbers of Afghans socialised and where I also spent some of my time. As I gradually came to see my research site as made up of the interactions and relations between Afghans and foreigners, it became difficult or even counter-intuitive not to turn my lens onto the dynamics taking place in these circles. In turn, this led to ‘the uncomfortable feeling that the enterprise my informants (in this case expats) thought they were contributing to was in fact quite different than what they were expecting.’ (Pottier, Hammond et al. 2009: 15 ). When I was interviewing Afghan government officials, journalists and women activists it was normally very clear that it was a situation of research, whereas in my interactions with foreign informants information-sharing, participant observation and socialising occasionally collapsed, aided by an implicit assumption that, despite my declaration of my research agenda, those worthy of “research” was the Afghans and not “us”, the internationals.

Research ethics requires amongst other things, a reflection upon the power relations through which the research takes place, from defining the research agenda, carrying out fieldwork and the dissemination and readership. While I was conscious of the ways in which research in a setting like Afghanistan could easily exhibit traits of colonial ethnography in the sense of providing “solutions” for Western governments, an activity I was determined to avoid, this was of course not the only immediate usage my research could have served. And some seemed to suggest that in settings like Afghanistan the stakes are so high that mere “scholarly” justifications for one’s research were indefensible. It potentially made me, in the damning words of another foreign researcher in Kabul, ‘another person using this traumatised country (Afghanistan) for the sake of getting a PhD without giving anything back.’ According



to this researcher, there should be an immediate purpose to my research, something tangible that would somehow improve the situation of those affected by my topic.

However my methodology did not sit well with “bearing witness” or “giving voice” style of research either. The former, the notion that my research should contribute to the public knowledge of abuses and therefore, generate political change I found implausible in the context of Afghanistan. It was not the lack of knowledge that perpetuated the kind of incidents I have written about in this work. They were all known, locally, nationally and to some extent internationally. People much better equipped and capable than myself spent considerable efforts attempting to protect the victims and bring perpetrators to justice, and generally advocate for change. In general, in an unpredictable, secretive and highly politicised context like Afghanistan attempts by an outside researcher to follow up sensitive cases and issues could easily have proved counterproductive.

Neither did I feel that my research fitted into a framework of “giving voice” or subaltern history writing. While I believe that this kind of activism has its place, it also becomes easily paternalistic, and is certainly political in the sense that “giving voice” is not a neutral act, but always intertwined in power. That such techniques were now also a standard repertoire of ‘donor driven activism’ ( see chapter 3) was exemplified by a conversation I had with an employee at one of the international organizations in Kabul working on women’s rights just after I arrived in Afghanistan. She told me that prior to her arrival, her organization had launched an ‘oral history project’ that aimed to give voice to women who had been sexually abused during the conflict years of 1979-2001. However, she had found the first year of the project to have been a ‘complete fucking mess’. The researchers had been made to believe that their job performance was measured by the number of testimonies they could collect. Thus, research staff would go homes and call women who were not willing to talk about their experiences of abuse ‘not Afghan’( implying they were unpatriotic). There was no psycho-social training for researchers, and women who had agreed to ‘testify’ about deeply traumatic experiences were often left alone crying in their houses after they had been interviewed.

At the time that I was told about these rather appalling practices the project was under review and was due to be re-launched according to better standards. It nevertheless starkly illustrated how far oral history had travelled from its more radical origins. While supposedly about giving voice to a subaltern group, oral history now seemed entangled in other logics and objectives. In this case it appeared that the project had been established in a rather

unreflective manner, perhaps because oral history which would give “women a voice” now was a typical component of donor funded women’s rights programmes everywhere. The astonishing insensitivity to the people that the project was supposed to represent certainly suggested that other agendas; funding or organizational growth was at the core of the project’s establishment. In any case, even if my objective had been to “give voice” or acknowledge the experience of women affected by violence, my methodology, which focused on contestations over gender violence, meant that my informants did not constitute one group of people, but differed widely in terms of gender, class, nationality, age, professional background, political outlook and religious orientation.

However, even without a promise of a tangible and immediate contribution, there seems to me to be abundant justification for studying the dynamics of post-2001 Afghanistan. There was of course no getting away from the fact that as a foreigner and as a Westerner, I often shared came to share space with a massive community of military and aid actors. But as long as the research lens was also turned on ‘the foreigners’ as the internationals in Afghanistan were mostly known, this could also be a research opportunity rather than a reason not to proceed. And as this thesis argues, struggles over violence against women were in important ways shaped by the Western presence in Afghanistan. Exposing these dynamics in more detail and making them available for analysis seems like a worthwhile –perhaps even necessary – undertaking.

But as I proceeded with my data collection, a dilemma nonetheless made itself felt. I was torn between a position of solidarity to the victims of violence and those working to support them on the one hand, and a more critical stance towards the power relations that they were enmeshed in on the other. For instance, when researching and writing about the controversies around the shelters ( see chapter 5) — and exploring the hierarchies that their constitution as ‘transnational entities’ dependent on Western supported entailed— I sometimes felt uneasy about the way I was subjecting them to such critical scrutiny — these were after all organizations providing an important service. As this thesis describes, shelters were often the only place where women fleeing abuse or unwanted marriage could go. At times, it seemed petty to question their mobilisation of Western funds and support when this obviously enabled them to offer women with very few options a place to stay. The uncompromising stand of some of the shelters — enabled by the relative autonomy from the government and Afghan society that their external support afforded them, also allowed them to accommodate a wider range of women — those who might be excluded as unworthy of protection by shelters more

in line with government policy. Refusing to compromise and pushing the boundaries of female propriety is an act of feminist defiance, at least at face value. Should I not place myself in solidarity with such a stance?

Similar dilemmas faced me when writing about the trade-offs and short cuts involved in the ERAW law; the law, as chapter 4 details, came to be promulgated and implemented in ways that was largely dependent on Western pressure and funds, and that undermined parliamentary process. It was also technically flawed — in contradiction with the rest of the legal framework and with unclear legal terminology which could make it difficult to implement for judges. Yet, as some women passionately argued, it was in many ways a big achievement. Indeed, one official in the Ministry of Women's Affairs told me directly to 'leave the ERAW law alone' and avoid drawing attention to the questions around its legal status (it had yet to be ratified by parliament, and some of the law's supporters felt that conservative MPs would never approve it anyway, so the best strategy would be to discreetly withdraw the law from parliament), or even to the law's existence.

Both of these cases brought to the forefront the tension between not wanting to belittle the question of gender violence in Afghanistan— and the sense of urgency and outrage that activists were trying to generate around it, and yet attending to the task of scrutinising the power relations that were produced and maintained through the processes I was examining. Of course, the latter can also be a productive exercise for activists — in the sense of engaging in reflective praxis. But I was not a fellow activist — I do not have a background as a feminist activist anywhere and certainly not in Afghanistan. I was a foreign researcher. In fact, I arrived to the field somewhat unprepared for the politics of feminism, in the sense that I had not engaged in much conscious thinking about the different coalitions, imaginaries and tactics that feminists employ, and disagree over, when it comes to furthering agendas of women's rights. Instead I was ready to focus on my task of mapping the field of contestations over gender violence —its definition and regulation. The main fault line that I envisaged to encounter was that of struggles between feminists and their adversaries—those who sought to define gender violence in ways that reinforced patriarchal privileges or as a regrettable part of Afghan 'culture'. I had not given much thought to the more 'internal' dilemmas of feminist political praxis; of the tensions between the immediate and the long run, between making broader coalitions or seizing the moment even if it made for uncomfortable alliances. But it was these questions around political *strategy* that would come to occupy my thoughts more and more. I found myself agonizing over an emerging conviction that real feminist gains

could only be anchored in democratic political relations, when at the same time, I could not see much possibility of this happening in Afghanistan, and perhaps not always so much interest amongst women in broader mobilisation and independence from external support either. For many of my female informants the important thing was to get the infrastructure that could ensure women a measure of protection from violence immediately, even if this meant doing it through Western pressure and funds. They sometimes pointed to the difficulties of more directly confronting the conservatives in their country. The latter commanded significant powers of intimidation; although political violence against women was not all that widespread compared to settings such as US-occupied Iraq, out-spoken women always risked being labelled immoral or Westernized, which could cost them both the support of their families and make them feel insecure.

As citizen of a country where a choice involving weighing outspokenness and assertiveness against physical security was inconceivable, taking a more critical approach to the practices through which activists sought to further their goals sometimes felt like an exercise of academic indulgence. Potentially, my research could serve as an input to debate, and I have shared a couple of my draft chapters with some of my Afghan informants. However making claims regarding the direct contribution of this thesis to discussions about strategy or reflexivity in Kabul and beyond would be quite exaggerated. The thesis is not accessible enough and most of my informants do not have the time to devote to read through it.

Up to a point I have sought to rectify the dilemma I experienced between political-ethical commitment and critical analysis through striving to be empathetic in my critique. As I elaborate in the conclusion of the thesis, I could not see any easy choices or irrefutable positions in the struggles that I write about. During my fieldwork I saw for myself how quickly and easily fear can make you conform. I recall my own anxiety, especially in the beginning of my stay in Afghanistan, sometimes set in motion just by facing having to walk on my own for short stretches and how my main strategy to overcome this was to dress fairly covered up and modestly and sometimes to—often quite subconsciously—adopt a posture of feminine deference when walking around, to signal respectability and conformity. My own feelings of insecurity were of course rooted in a different kind of positionality than that of my Afghan informants. They were generated by my formal identity as war-waging Westerner, a kind of occupiers' colonial paranoia, fuelled by rumours of kidnappings and attack plots. My endeavours to make myself as inconspicuous as possible by dressing and appearing modest and discreet were in fact mostly an attempt to set myself aside from the 'bad' Westerners

rather than from 'bad' women. My point here is that the courage I sometimes needed to summon up to overcome such everyday apprehensions was miniscule compare to the fearlessness that many Afghans displayed when engaging in politics, travel or just daily life. I feel that if I am to engage in critical analysis of Afghan feminist politics then I must do so with the acknowledgement that in the setting where I worked there were just a number of difficult choices, none of them great, all in some ways flawed, for the actors involved and for the researcher.

## **Chapter 3: Intrusions, invasions and interventions: Historical lineages of gender, justice and governance in Afghanistan**

### **I. Introduction**

In this chapter, I delve into the social and historical context of contemporary discourses about violence against women in Afghanistan. As I argued in chapter 1, competing definitions of gender violence are also clashes over different visions of gender roles and women's position. I start this chapter by detailing a particular set of gendered ideals informing the lives of Afghan women and men and discernible in contestations over violence against women. In Afghanistan, as in Muslim-majority countries in the Middle East and Asia more broadly, highly gendered boundaries of 'inside and outside' tied up with female modesty and seclusion, male guardianship over female dependents, and ultimately, kinship claims over female sexuality and reproductive capacities form powerful ideals. Below, I elaborate on these norms and expectations whilst at the same time, cautioning against universal and ahistorical templates of the public and private, of male dominance and female powerlessness.

I also lay out some of the historical context shaping the terrain on which today's contestations over gender relations and gender violence are being fought out. I discuss the origins and evolution of Afghanistan's legal system, whose shifting orientation and reach set the stage for how, today, individual cases play out in courts and public forums. I examine the historical precedents of today's efforts to achieve tighter state regulation of the family and sanctions over the abuses committed within it. This requires an appreciation of the various forces and motives driving earlier rulers when they sought to subordinate the domestic domain to state intervention. Finally I look in detail at two important parameters of how gender relations are negotiated and contested today; the current legal landscape and the post-2001 arrival of donor driven gender activism (Kandiyoti 2009).

### **II. Gendered boundaries and hierarchies**

In a newspaper interview, the female MP Azita Razaq, from the Northern province of Badghis revealed that she had spent some of her childhood years masquerading as a boy

(Nordberg 2010). Dressed in boy's clothes she could run errands for her family and help out in her father's shop. Now she was resuming the trick with one of her own children. With only daughters, Mrs Razaat and her husband had decided that one of their girls would assume the identity of the son they did not have. Their youngest daughter was duly dressed up in boy's clothes, her hair was cut short and she was given a male name, Mehran. With a son to present to visitors, Mrs Razaat could avoid the exclamations of pity and community gossip that families with no sons had to endure. Mehran could also act as a *mahram* for her sisters – a male either a husband or a relative forbidden to them in marriage and therefore an appropriate escort –allowing her sisters greater mobility. And Mrs Razaat could focus on her job as an MP rather than going through another pregnancy with the possibility that she would yet again fail to deliver the son her husband wanted, or worrying that he might attempt to take another wife ( *ibid.*).

Mehran's family was not the only Afghan family who had adopted this creative solution to what was commonly regarded as a grave misfortune – having no sons. The practice of dressing up girls as boys in order to compensate for the lack of sons was sufficiently established to have a name; *bacha-posh* ( lit. 'boy dress') (Arbabzadah 2010). The fact that many families felt that their daughters could only perform the functions and tasks of sons if they posed as boys testified to the relative rigidity of gender expectations in Afghanistan. The ideals of gendered behaviour were also reinforced and reflected in the strict boundaries between the inner world of the household and family and the outer world of business, politics and public life that were often observable. According to such ideals, the inner quarters of the home are a place of sanctity and intimacy, not to be entered without invitation, and when invited, great attention is due to one's prescribed role as a guest. To go into a house uninvited or to intrude upon the private quarters of the home would be to openly taint the standing of the household head. Traditionally-built houses were generally secluded with tall walls to protect residents against public view.<sup>20</sup>

The ideals of gender roles and of keeping boundaries between the inside and the outside amount to a system of segregation along gender lines, which places women under the authority of male household leaders and facilitates kinship and conjugal control over their sexuality. The household head is by convention male, and his standing in society to a large

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<sup>20</sup>The Taliban also recognized the notion of an inviolable domestic sphere. Said the Minister for the Promotion of Virtue and the Prevention of Vice ...We do not enter anyone's house. Everyone is free (*hurr*) in his home. God will punish him for any vice he commits there. What concerns us is open vice (*al-munkarat al-zahirah*) in the streets or public places(*al-amakin al-'ammah*). Cited in Cole 2008: 134).

extent dependent on (or reflected in) his ability to uphold and protect the integrity and seclusion of his family and its women, and his land and property, encapsulated in the Persian phrase *zan, zar and zamin* (woman, gold and land). Such matters constitutes *namus*, described by Edwards 'as all those things that [a man]' has that other men might desire and whose inviolability to those desires constitute the primary criterion of his worth' (Edwards 1996: 58). However a man's *namus* most strongly connotes control over one's women, their sexual fidelity and virginity and their protection from the intrusions of other men.

*Namus* is often translated as honour, and thus we enter a terrain littered with pitfalls, because the framing of gender relations in an honour /shame model has tended to produce both academic and popular stereotypes. At least since the publication of Peristiany's edited volume; *Honor and Shame: The values of Mediterranean society* (1966) 'there have existed a sex-linked, binary opposition in which honour is associated with men and shame with women' (Brandes 1987: 122). Totalizing concepts of honour and its opposite; shame, has evoked notions of reified codes with the power to determine behaviour; compelling men to seek and protect honour at all costs, and women to lead a passive existence secluded and at home, in order to fit into 'their' ideal; shame and modesty (Weidman 2003: 520; Latreille 2008).

However, in her classic ethnography of a Bedouin community, Lila Abu-Lughod (1986) shows a more subtle, relational approach to thinking about honour and shame. She suggests that we understand honour as 'the moral basis of hierarchy.' As Meneley (Meneley 1996; Meneley 2000) and Lindisfarne (1994) would later do, she sees in the ideal of honour a way of coding relations of subordination and domination in a moral language. When women are spoken about as the *namus* of male family members, and the act of upholding their chastity and protection against external dangers as *gheirat*, (manliness, zeal, male honour) a gendered relationship of male authority and female dependency is affirmed.

In turn, for women, modesty is a way of signifying deference to both their male guardians and to a particular gender ideology. By concealing their sexuality through the adoption of modest clothing and composure, or practicing seclusion from men they could conceivably be married to (those who are *gheir mahram*, as opposed to *mahram*) women are validating the authority and prestige of their fathers, husbands and brothers. From a man's perspective, to expose one's womenfolk to the gaze of outsiders is to make oneself vulnerable, both to the temptations of other men, and to accusations that one is in circumstances where one is unable



to protect or control one's women. In the most conservative families and settings women's faces are therefore prevented from ever being seen by an unrelated, *gheir mahram* male upon reaching sexual maturity, which often translate into more or less constant confinement to the house. Women's names should not be known to the broader community, and for one man to enquire about another's mother, sister or wife can be considered a great insult. Yet, the complete seclusion of women is a normative ideal seldom practiced to the full and of varying importance. Rural women, for instance, may have considerable freedom of movement if they work in the fields, are living in a small village surrounded by kin or extended family, or if they herd animals (Barakat and Wardell 2002). And as Edwards notes in his account of a man who blinded his own mother after she pre-empted his ability to avenge the killing of his father, those who display excess in adhering to the ideals of honour are also held in disregard (Edwards 1996).

Nonetheless, even when women are granted more mobility and visibility in the 'outside' or public sphere their modesty in conduct and attire is keenly monitored and any transgression carries the risk of slander, which may affect both male relatives' standing and, if single, a woman's own marriage prospects. If a young woman gets a reputation for frivolity, marrying her, or even one of her sisters can be considered reckless for prospective husbands and her in-laws. Apart from the risk that such a woman might represent through her future conduct, accepting her into their family also signals that they are willing to compromise on the standards of their women, and are thus perhaps in a vulnerable situation.

Consequently, a woman's family and particularly her male relatives will often be uncompromising towards indiscretions and respond with strong sanctions, even killing. Women themselves generally take great care to maintain a modest persona in public – to do otherwise would be to expose both themselves and their families whose fortune is closely intertwined with their fate, to malicious rumours. This often means, as Azerbaijani-Moghaddam<sup>21</sup> observes, that a woman must not place herself in a situation where her chastity cannot be vouched for – for instance being in a secluded setting with a man unrelated to her by (close) blood ties or marriage or spending time unaccounted for out of the house for instance by failing to arrive straight home after working hours ( See also Anderson 1982).

As in other largely gender segregated societies, chiefly in the Middle East, attention to women's seclusion and sexual propriety have been embedded in broader relations of kinship

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<sup>21</sup> Personal communication, Sippi Azerbaijani-Moghaddam.

and gender where (in the ideal form) households are headed by the senior male, who commands authority over the family's assets and his dependents in relation to other heads of households, and the state and outside authorities more generally, what Kandiyoti (1988) defines as "classic patriarchy". Families are organized according to patrilineal descent, and the arrival of boys are generally favoured over girls, as the latter will move away from the household to become the wife and daughter-in-law in another family. As they enter their marital home as young brides, women generally hold a low status, advancing their way upwards in the family hierarchy through hard domestic work, self-sacrifice and the birth of sons (Abu-Lughod 1986; Afsaruddin 1999).

Great emphasis is placed on the integrity and cohesion of the household unit. Economically, households were and still often are dependent on a cooperative mode of operation. It is widely held that revealing details of family life and certainly disharmony within the house 'renders the household vulnerable to the machinations of others' (Tapper 1991: 231). The importance of the "closed" home and maintaining privacy thus finds itself reinforced on many levels. Marriage is a process normally presided over arranged by senior household members. It is invested with great importance, not only as the means to ensure progeny and the continuation of the lineage, but also as a way of making and affirming alliances (Tapper 1991). The groom normally has to transfer a substantial brideprice (*walvar*) to his bride's family, or at the very least pay for elaborate wedding celebrations, which means that weddings are often prohibitively expensive for young men and reinforces their dependence on their fathers and families (Ibid:15).

Ultimately, such patterns constitute women as dependent minors over whom kinship groups and particularly male family members hold legitimate claims. This claim is first and foremost over women's sexuality and reproductive capacities: in other words, the prerogative of families to arrange their marriages. Social sanctions against female mobility and visibility must be understood in this context. Gendered concepts of honour reinforces an individual's ties to kinship or extended family (Zuhur 2005), hereunder women's duty to defer to kinship claims over their sexuality. A woman's honour – first and foremost her undisputed virginity and her subsequent sexual chastity is the currency that enables her kin group to 'give' her away in marriage with promises of exclusivity<sup>22 23</sup>. But as Azarbaijani-Moghaddam points

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<sup>22</sup> As Strathern and Whitehead argue, although women are effectively being transacted in marriage, this does not mean that they are merely 'things' or objects of property. Strathern cautions that we must be careful not to confer the notion of Western private and therefore disposable property on the exchange of women through marriage,

out, men might also suffer from the demands of these normative ideals (Azarbaijani-Moghaddam 2010). A casual conversation with an acquaintance, a professional man from a conservative province, prompted by my curiosity as to whether his wife was working, revealed the tensions he and probably many other men felt between his personal preferences, the importance of respecting community sensibilities and maintaining his own reputation

Me: *Abdul Khalique*<sup>24</sup>, *does your wife work?*

AK: *Only women from poor families and civilized families work....Some years ago I had to move in with my brother. His wife could not cook, clean and wash the clothes for all of us, it was too much for a single person so it was decided that I should get married. Although I am a researcher, an intellectual, my wife is illiterate. I should have liked to have marry an educated woman, even for my children it would have been good, to have an educated mother.*

*But in our province, it is not acceptable for women to go outside, to work outside. So I married a woman who was not working, who would not go out. She is illiterate. In order to satisfy the people in my local community, to not upset them, I did this.*

*You see, in my province, in my home area, I am well-respected. I can go anywhere in my home area, people will look up to me, even if I work for an NGO. Some people from my province... well they might have successful careers with international organizations, but when they go to their home area, people do not respect them, because of the way they live, because they don't have any regard for the feelings of their own people. For instance, they will go for trips to Tajikistan<sup>25</sup> without care about how others feel.*

*We are a Muslim country. But you know actually Afghans are not real Muslims. If we were, we should allow our sisters to come and work in our offices, to work opposite us as our colleagues...there is nothing wrong with this. You see there are women in my office and they work with us and they are good women and conduct themselves well.*

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instead these transactions could be more usefully understood as the exchange of inalienable gifts. Whitehead suggests that what is constructed through the practice of marriage is differentiated subjects based on gender; men appear as full acting subjects who can transact women, whereas the latter, unable to transact men, appear as 'considerably less than full acting subjects' (Whitehead 1984: 189, Strathern 1984).

<sup>23</sup> Nonetheless, echoing debates elsewhere, there are divided opinions in the literature about the extent to which such practices disadvantage women. Some, like Barakat and Wardell have emphasized the affirmation and self-realization women gain as mothers, daughters and wives, and contended that women exercise power in the private sphere in ways not necessarily appreciated through 'a Western feminist prism'. ( Barakat and Wardell 2002). Others warn against a romantization of what are unequal power relations ( Ahmed-Ghosh 2003 Azarbaijani-Moghaddam 2006, 2007) As Azarbaijani-Moghaddam, (2006) points out; 'The power and respect Afghan women apparently command in the family is bought at a tremendous price with a great deal of self-denial and suffering ( p. 31).

<sup>24</sup> *pseudonym*

<sup>25</sup> In Afghanistan, Tajikistan is often considered a place where Afghans goes solely for the purpose of pursuing illicit pleasures which are unavailable in Afghanistan; drinking and womanizing.

*They make good examples...It's more complicated for women to work. If I work until late in the office, if I come home at ten or at midnight, there is no problem. But if a woman come home from office any later than five, people will talk.*

*And there are some women, they have ruined it for everyone else. Some of these NGO women... they prostitute themselves. Like NN [names a well-known woman activist who runs an NGO]. She has had relations with so many men.*

*Me: Maybe it's just talk? You know how people talk.*

*AK: No, I know..One of my friends has been with her. Because of people like her others are not allowing their women to work.*

While Abdul Khalique is regretting the restrictions such ideals have placed on his own life, at the same time he finds the selfishness of those who choose to disregard them abhorrent. For him, to refuse to live by such norms is a deeply anti-social act, a signal to one's local community that their sentiments, and by extension they, do not matter. There is a more prudent concern with one's own status and ability to save face here as well, but this easily slips over into questions of morality and respect for one's community. The link between status and adherence to these norms, coded in a language of morality, is further underlined by Abdul Khalique's statement that only the women of 'poor and civilized families' work. The former are not in a financial situation to observe these standards, whereas 'civilized' families; those who are educated, well off and have adopted a more cosmopolitan lifestyle, are in a position to ignore gossip about the conduct of their women.

Indeed, I often heard dismissive references to a handful of prominent Afghan men who had married foreign women, sometimes breaking up an engagement or divorcing their first wife in the process. Even if their wives were often Muslim, they were considered unverifiable in terms of their prior conduct and chastity. Having shown that they were willing to settle for women of unknown backgrounds, their husbands were considered to have 'opted out' of Afghan society to a certain degree, and could be subject to a certain amount of gossip. Their brothers might start to question their right to their share of the inheritance, and their choice of wife interpreted as a sign of lacking real political ambition. Comments like, '*we don't know if we can count on him anymore, now that he has gone and married that foreigner*' expressed the link between status and adherence to gendered ideals.

Clearly then, while this kind of gender ideology situates women and men unequally, it also differentiates *between* men (and between women). As noted by Lindisfarne, ‘in any settings, notions of honour and shame are not separated by the political economy, rather they are a mode of interpretation through inequalities are created and sustained’ (Lindisfarne 1994: 85). She points out that in reality, ‘the protection of and the predation on *men* as well as women can be justified in terms of values derived from the ideology of honour and shame.’ ( *ibid.*) The inviolability of *namus* is thus inexorably linked to sustaining class position. To be in a position to protect one’s *namus*- both women, land and property, independently, serves as a marker of status. Traditionally, to be able to keep one’s women in *purdah* ( lit. curtain) was a matter of means, poorer tenants and others often had no choice but to have their women working outside of the home (Boesen 1983; Kakar 2004). Moreover, to be able to violate others’ *namus* – in extreme cases by kidnapping the women of one’s enemy – with impunity is an effective demonstration of power. For instance, ethnographic work amongst Pashtuns such as Lindholm’s (Lindholm 1982; 1996) suggest that sexual conduct is an important signifier of adherence to *Pashtunwali* <sup>26</sup> and the thus right to be acknowledged as a Pashtun. Sexual coercion and sexual access are therefore idioms of power. Having many wives, and being able to keep them in seclusion, constitute markers of class and status. Lindholm argues that marriage and its consummation carries with it undertones of domination and subjugation, not only of the bride, but that of her lineage. Giving away women in marriage is a shameful business, whereas ‘taking’ women in marriage is a sign of one’s ability to dominate other groups (Lindholm 1982). The bride takers must therefore be superior to the bride givers. A powerful man might demonstrate his power by taking multiple wives, as well as mistresses, whereas to give women to people considered socially inferior is problematic.

Therefore, as elsewhere, the ideology and actual practice of gendered spheres must be understood in the context of the historical specific realities of race, class, and ethnic

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<sup>26</sup> Often translated as ‘the way of the Pashtun’ or more directly; ‘Pashtun-ness’ *Pashtunwali* refers to a Pashtun framework defining honorable conduct.. (Rzehak 2011). Rzehak aptly calls it an ‘ethnic self portrait of the Pashtuns according to which the Pashtuns are distinct from other ethnic groups, not only due to their language history and culture but also due to their behaviour.’ ( p. 1). Originally transmitted orally, *Pashtunwali* was later documented and analysed by colonial scholars, anthropologists, nationalists and folklorists, sometimes with the result that what were more flexible ideals became reified as a singular tribal code determining the behaviour of all Pashtuns ( *ibid.*). In turn, this reification has paved the way for astonishing statements such as this: ‘Modern Afghanistan has changed little from 1897 when Winston Churchill fought in a punitive expedition on the Afghan border against the Pashtuns. Today, as in Churchill’s era, Afghanistan is remarkable for the tribal code that permeates the countryside and nowhere is this more defined than in south-eastern Afghanistan, where Pashtun culture overshadows central government authority and the local rule of law. Pashtun culture is dictated by a common law, a set of values, a code and a manner of living termed ‘*Pashtunwali*’. This quote is from an Australian military journal. ( Hawkins 2009: 16). I will say more about the military fascination with ‘tribal’ Afghanistan in chapter 6.

difference (Helly and Reverby 1992). Historians have showed that the models of the domesticated, dependent female and the public, providing male of Western bourgeois society were the ideals of a certain class in a certain time. Lower class and non-white women (and their spouses) were less able to maintain such ideals and was also subject to intrusive state interventions into their personal life for a variety of purposes. Similarly, gendered ideals described in this section are as alluded to above, most closely associated with Pashtuns, for whom they constitute an integral part of *Pashtunwali*. As the dominant group in Afghanistan since its entry into modern statehood many Pashtuns have often prided themselves of their superior levels of female seclusion and their uncompromising standards of honour. The Hazara, historically the underclass in Afghanistan, has generally been least able to maintain these standards; thousands of women were forced into bondage during the Pashtun monarchy's conquests of the Hazara highlands during the late 19<sup>th</sup> century, and more recently, Hazara women have been working as maids in more well off households, their husbands unable to make sufficient money to keep them at home.

The bearing of these gendered norms on lived realities have also been undermined by a series of economic and social transformations, which have had profound and yet underresearched effects on household organization and gendered divisions of labour (Daulatzai 2006; Kandiyoti 2007). Under conditions of dislocation, the arrival of a cash economy and access to paid employment the idea of the male headed household where women and dependents are provided for, must be considered to belong to an idealized past. For instance, the disruption of war has undermined many families' ability to absorb widows, leading to many female headed households (Daulatzai, 2006). Similarly, the arrival of comparatively lucrative job opportunities in the aid sector means that many women, at least in urban settings, are providing an important family income or even acting as the main bread winner.

Nonetheless, it is clear that all groups in the country to an extent share the knowledge of a 'script' or perhaps a potential aspiration, in which female seclusion and the sanctity of the home constitute markers of status and where men make up the real members of political and public community. This normative discourse, while of various degrees of relevance to the lives of individual men and women, were evident in contemporary contestations over gender violence and often shaped them in particular ways. Most strikingly, as I argue in chapter 7, episodes of gender violence and their aftermath remained largely articulated and made public through male relatives and representatives so that naming, intervening in and avenging violations were largely mediated by the man under whose authority and guardianship a

woman was placed. In fact, violations such as sexual violence were often spoken about as infringements against male family members rather than against the women who were raped.

Nonetheless, historically and today, nuances exist concerning the exact ways kinship authority over women are articulated, in the moral idioms such claims have been rooted and the larger political relations into which they are placed. This variety resonates with research examining the ways in which gender boundaries have been sanctioned in public and government practices across Muslim majority countries. To appreciate and accommodate such variations the first task at hand must be to reject an understanding of government policies as the epiphenomenon of unchanging gender relations as prescribed by culture or religion. Annelies Moors points out that earlier scholarship on gender in Muslim-majority countries often considered family relations as the outcome of the provisions of Islamic law (Moors 1999: 142). When academics working on gender in the Middle East instead started to examine gender hierarchies and boundaries and their recognition and enforcement in government practices in historical time and space (Thompson 2003), they found that there is no universal templates to be derived from Islam, 'tradition' or a modernizing state (Thompson 2003; Welchman 2011).

One reason for why we should expect variation in how gender relations are sanctioned in government practices is that this question forms part of larger political struggles, struggles which necessarily have context-specific outcomes. For instance, the positioning of men as gatekeepers to families, homes and women vis-à-vis both other men, and public authorities marks boundaries which are embedded in larger political relations. In this sense attempts by the government or by others to regulate gender violence are not only matters of gender relations or the rights of women per se. For instance, outside attempts to regulate marriage or to frame it as a matter between two persons – rather than their extended families – encroaches upon a key alliance mechanism between families. As Noelle-Karimi (2002) notes, it has been no coincidence that modernizing Afghan rulers, whether King Amanullah during the 1920s, or the revolutionary communist government during the cold war, focused their efforts on implementing new marriage laws. Officially, such attempts were framed as measures to eradicate 'wasteful and backward practices' such as bride price (*walwar*) or underage marriage. However, another goal was to subject the family to the control of extra-kinship networks of regulation and power (Ibid.).

The very idea that exposing the family to outside purview and intervention constitutes undue intrusions upon privacy and autonomy is therefore not a mere patriarchal reflex. At stake are the political arrangements which underlie male and kinship prerogatives not only in relation to women, but also against central (and local) power. And indeed, as is commonly observed, in the modern history of Afghanistan the position of women and the right of the central government or other outside powers to regulate the field of family law have constituted an enduring flashpoint. Yet as Kandiyoti (2007) points out, these confrontations are not reducible to a perpetual conflict in which central and tribal power were locked into struggles against each other. As will be illustrated in the section below, the ‘terms of these contestations were substantially transformed through time, as were the nature of political actors and the types of discursive resources they drew upon to establish legitimacy’ ( *ibid*:173). It follows that the outcome of contestations over gender relations was closely intertwined with the fate of the broader political constellations in which they were grounded, and the degree to which and the particular ways that gender boundaries were politicized. In the next section, I describe more systematically the historical trajectories of attempts to regulate the family and gender relations by different rulers in Afghanistan.

### **III. The emergence of a centralized legal system in Afghanistan**

Attempts to transform gender relations by central powers depend in the last instance on the institutional infrastructure that can carry out such policies, in particular the institutions of justice. In Afghanistan, as elsewhere, the ebbs and flows of judicial centralization have taken place in conjunction with struggles by central governments to consolidate power and carry out specific political projects, in turn challenged or circumvented by other power centers’ attempts to (re-) assert themselves. The constituencies and resources called upon in these successive efforts varied over time, as did their degree of success. By the beginning of the 21<sup>st</sup> century, the country represented a rather extreme example of legal pluralism by design as well as default – a reflection of the turbulent history of ‘statebuilding’ in Afghanistan. The official legal framework was a patchwork of codified laws derived from sharia, secular laws, and non-codified Islamic jurisprudence. Moreover, this official legal framework co-existed and competed with localized, non-formal legal practices. This section gives a brief overview of the historical processes that produced the legal landscape of present day Afghanistan, which takes us through the recent political history of the country.



The ulama – (Muslim clergy) – have historically formed the backbone of the Afghan formal justice system. As specialists in religious texts and jurisprudence, traditionally the only route to learning, members of the ulama have been given official positions in the administration of justice since the beginnings of the modern Afghan state; the confederation of Pashtun Durrani tribes founded in 1747 and headed by Ahmad Shah Durrani. Ahmad Shah made the Hanafi doctrine, one of several Sunni schools of jurisprudence, the official doctrine of the government (Nawid 1999: 7). *Qazis* (judges) appointed by the state operated in larger towns, whereas in the countryside, they often adjudicated more or less autonomously, upon request and in return for fees. In rural areas, most criminal cases were anyhow settled by customary processes in which the mullahs played only a marginal part (Olesen 1995). Subsequent rulers attempted to curb the powers of tribes by taking jurisdiction over murder cases and the implementation of reforms of government administration, but were hampered by instability and civil strife.

A larger number of ulama were made state employees as justice officials by *Amir* Abdur Rahman Khan (r. 1880-1901) in the late 19<sup>th</sup> century, as part of his extensive and often brutal efforts to centralize state power (Gregorian 1969). A close ally of the British, to whom he owed much of his position, Abdur Rahman Khan set out to create a unified countrywide justice system in which government *qazis* held the monopoly over adjudication. He took control over the *wazifa* (allowances) of religious actors and subjected the ulama to examinations to verify their skills, thus effectively making them salaried bureaucrats.<sup>27</sup> These moves weakened the ulama's ties with the tribes and local power-holders and brought them closer to the state, giving rise to periods of accommodation, co-optation and confrontation between the state and the ulama as a social and political group. Olesen points out that enlisting religious clerics in the dispensation of justice had less to do with desire to foster closer adherence to religious doctrine and more to do with the *Amir*'s drive to consolidate power (Olesen 1995: 66), which he did by claiming divine right to rule and through the application of considerable coercive force. Abdur Rahman Khan's appointment of the ulama as state employed justice officials was also part of his agenda to curb their influence. Having played an important role in the political landscape inciting the population to jihad against the British invasions during the 19<sup>th</sup> century (Kamali 1985), the religious leaders had become

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<sup>27</sup> The autobiography of Abdur Rahman Khan (1980) suggests that allowances were paid by the government before, but just for political support, not as 'salaries'. (p. 31).

powerful political actors. In turn this had also increased their importance as legitimizers of the ruler (Nawid 1999: 188).

As other Afghan rulers before him, Abdur Rahman Khan took jurisdiction over serious criminal cases, offenses against the state and whatever other cases he felt it pertinent to preside over, thus asserting the monarchy's supremacy in the dispensation of justice (Olesen, 1995:65). He operated as an absolute ruler. There was no constitution, and the Amir was free to enact laws and take decisions as he deemed necessary. During his time, numerous laws were promulgated, some of which attempted to bring women and family under closer government regulation (Khan 1980; Ghani 1983). All marriages were to be registered with the authorities, a ceiling was placed on brideprice, and underage (pre-puberty) marriage (when against the will of the girl) and levirate were prohibited. It is difficult to assess to what extent these laws were implemented, although the work of Ghani (1983) suggests that they were systematically enforced in courts in at least some provinces.<sup>28</sup> Abdur Rahman Khan's attempt at judicial centralization also had a sectarian dimension. His conquest of Hazarajat, the central highlands where the Shia Hazaras had lived largely autonomously, was mobilized through a call for jihad through which the Amir aimed to forcefully convert them to Sunni Islam. As part of this campaign, he appointed Sunni judges to all Hazara areas and instructed them to apply Sunni Hanafi jurisprudence (Ibrahimi 2009: 7).

During the reign of Amir Habibullah (1901-1919) calls for constitutionalism to curb the absolute power of the monarch emerged, both from (modernist) nationalists and liberal ulama (Nawid, 1999). Habibullah<sup>29</sup> successfully suppressed the constitutional movement, but the alliance between the ulama and the nationalists was to prevail for some time. Under the ascendancy of King Amanullah (r. 1919-29) these two groups gathered around an anti-British stance, which afforded Amanullah great popularity when he could claim to have defeated the British in 1919 during the third Anglo-Afghan war. The brief war, which had started when Amanullah proclaimed a war of independence against the British in a bid to rid Afghanistan of the status as a British protectorate, ended with a treaty between the two countries that recognized Afghanistan as a sovereign state (Barfield 2010). However, when Amanullah, emboldened by his newly attained status as a defender of nation and religion against imperial

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<sup>28</sup> Abdur Rahman Khan promulgated a Penal Code in 1896, which included fines imposed on villages nearby the crime. He heard cases of adultery theft and murder if the crime had occurred in Kabul and all death penalties were to be confirmed by him (Vafai 1988).

<sup>29</sup> Habibullah created a law of wedding ceremonies- (*nizam-nama-ye arusi*) . He also attempted to make a comprehensive codification of Hanafi law books, modeled on Ottoman Turkey during the *tanziimat* period (Nawid 1999; 177).

forces, embarked upon a series of ambitious legal and social reforms, splits between a modernizing monarch inspired by Kemalism and anti-imperial nationalism and an ulama concerned with defending Islam against infidel rule and Westernization eventually would be revealed.<sup>30</sup>

During his reign Amanullah promulgated 140 regulations known as *nizam-nama*<sup>31</sup> as well as Afghanistan's first constitution. Amongst the *nizam-namas* were several versions of a new marriage code, first published in 1920. A more exhaustive version was published in 1923, requiring the registration of all marriages. Polygamous marriage was made subject to the court's permission, and marriages where the bride had not reached puberty were banned outright (Nawid 1999; Gregorian 1969). The Constitution of 1923 placed few limits on the power of the king, although it made some limited provisions for consultative government. It named Islam as the official religion but made no mention of the Hanafi school, the latter in order to appeal to the Shia minority, who Amanullah had also released from slavery by decree. The Constitution recognized both secular and religious law and made no specification as to the authority of one versus the other (Olesen, 1995:122). It also bestowed equal rights on all citizens, in a breach of both existing privileges granted to the Durrani elite, and previous practices of treating non-Muslim minorities differently (Olesen, 1995; Nawid, 1999). Amanullah also set out to codify Islamic criminal law and to prescribe set punishments, resulting in the first Afghan criminal code of 1924-25. The Code classified crimes based on the four categories of classic Islamic criminal law; *hadd*, *diat*, *qisas* and *tazir*. The five crimes covered by *hadd*<sup>32</sup> prescriptions and major crimes such as murder and bodily harm were to receive set punishments whereas for lesser crimes the judges were to give discretionary punishments (*tazir*) (Gregorian 1969; Kamali 1985). The ulama however, proved deeply unhappy with Amanullah's reform in the field of criminal law, as they reduced the number of crimes where the Islamic judges could impose their own discretionary (*tazir*) punishment as they saw fit based on their knowledge of Hanafi fiqh. The very specification of set punishments beyond those set by God (in crimes of *hadd*) was seen as contrary to sharia (Kamali, 1985).

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<sup>30</sup>Nawid points out that 'although British sources refer consistently to Amanullah's apathy towards religious groups, other sources indicate that he cultivated excellent personal relations with eminent religious leaders in Kabul long before ascending the throne. ( *ibid.*p. 57)

<sup>31</sup> For an overview of Amanullah's *nizam-namas*, see Polluda 1973: 66-91.

<sup>32</sup> Hadd crimes (God-defined crimes) are crimes where punishments are regarded as immutable. Scholars and Islamic judges have nonetheless understood the evidential requirements and exact definitions of and punishments for these crimes differently. Crimes normally categorized as hadd include zina, ( adultery) sariq ( theft ) , harida ( violent theft) qafz ( false accusation of zina), ridda ( apostasy) and shurb kamr ( consumption of alcohol) Punishments are corporal (such as lashings, amputations and stoning) ( Peters 2005: 53).

With the government facing rebellions instigated in part by the conservative rural mullahs who perceived Amanullah as an adversary to their values and positions <sup>33</sup>, the urban ulama seized the opportunity to assert itself. A 1924 *Loya Jirga*, (grand assembly) confirmed the urban 'high' ulama as important power brokers and the victory of orthodox ulama over their more liberal counterparts ( Nawid 1999: 112). Olesen notes how the debate during the Loya Jirga of 1924 became the testing ground for the king's and his advisors' modernist interpretations of Islamic law, while the ulama appeared as exponents of the 'tribal outlook in which the inalienable individual rights to be defended against the encroachments of the state and the ruler' (1995:139). Upon the ulama's insistence, Amanullah was forced to retract many of his legal reforms. The Constitution was revised to reintroduce the discriminatory tax for religious minorities, and Hanafi law as the official and sole religious law. A new criminal code, in Arabic and based exclusively on Hanafi fiqh was to be compiled, and the right to determine *tazir* punishments was returned to the *qazis*. (Nawid 1999) However, after having successfully defeated the rebellion, Amanullah then launched another attempt at legal reform. This time, he tried to sideline the ulama completely, perceiving them as an obstacle to the progress of the nation. Amanullah's confrontational stance towards the ulama, combined with the announcement a new series of reforms, his increasingly authoritarian stance and his lack of coercive resources to back it up eventually led to his overthrow.

The next king, Nadir Shah, who rose to power following a brief interlude was beholden to Eastern tribes and showed less personal disposition towards radical reforms. He made significant concessions to the ulama and to tribal powers. The Constitution of 1931 reinstated the Hanafi school as the official religious doctrine and in general gave precedence to sharia over statutory law (Moshtaghi 2006), although as before, the final right of appeal remained with the monarch. In addition, the clergy was given influence through the governmental *Jamiat-al Ulama*, (lit. the society of religious scholars; the ulama council) who was entrusted with reviewing laws and government policies for adherence with Islam (Olesen, 1995:184). Not only were religious scholars co-opted by the state but Sufi networks also moved closer to state power with pirs (spiritual leaders) taking up government positions such as Minister of Justice.

Nadir Shah was assassinated in 1933. His only son, Zahir Shah, ascended to the throne but given his young age executive power was largely in the hands of his paternal uncles in the

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<sup>33</sup> Eastern tribes who were facing the abolishment of existing privileges in conscription and taxations were the other main group behind the 1924 Khost rebellion ( Polluda 1973).

first two decades that followed. During this time, which was a period of 'limited guided modernization' (Sharani 1986: 54) wide ranging developments in education took place. Secular education was expanded and in order to formalize higher religious education and train judges in sharia a number of the government madrassas were also established. To quote Olesen:

The key to the next three decades of comparatively peaceful development( .. ) lies in the new modus vivendi which was established between the state and the traditional groups whose economic and political interests were being observed while the gradual reform measures ( educational, administrative etc.) catered for the interests of the new elite of bureaucrats and educated middle class. A gradual transformation of Afghan society hereby took place which above all was characterized by its outward form of continuity but laid the basis of power political and ideological confrontations among the state supporting groups.. (Olesen 1995: 172).

The legal system became increasingly bifurcated. Civil and criminal cases were adjudicated in sharia courts whereas a number of statutory courts in each province had special jurisdiction over fields such as administration and business (Weinbaum 1980). This division also manifested itself in legal education. Two faculties at the newly established Kabul University taught law; the secular Law and Politics Faculty and the Faculty of Sharia. The Faculty of Law was based on the French model and supplied many of the civil servants. The Faculty of Sharia was influenced by Egypt's Al-Azhar, where many of its lecturers had been educated. Then as now, a degree from either faculty was not a requirement for appointment as a judge, who could also be appointed if having a license from a government madrasa (Moshtaghi 2006). However, from the late 1960s onwards, the government actively recruited for the judiciary graduates from the Faculty of Law, and gradually, in line with the expansion of secular education more generally, the religious establishment lost their monopoly of the state judiciary (Kamali, 1985: 207)<sup>34</sup> . Meanwhile, Pashtun nationalism had partly displaced religion as source of ideology for the government (Sharani 1986).

Zahir Shah for a period assumed full power for himself, resulting in the 1964 Constitution. A comprehensive and relatively <sup>35</sup> liberal document, that was to serve as the model for the 2004

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<sup>34</sup> Gregorian writes of the on 1931 Constitution: 'In granting the ulema broad powers but reserving for the monarchy the right of final appeal, Nadir seems to have made a deliberate though indirect attempt to make use of the religious establishment powers to extend the jurisdiction of the monarchy over the tribal territories. Article 93 prohibited the establishment of 'any special tribunal to settle particular cases out of court. ' ( 1969:305).

<sup>35</sup>But ' ..in reality the King had more powers than any other head of a constitutional monarchy could dream of enjoying'. ( Saikal, 2004: 15 ). Article 15 of the Constitution stated: The King is not accountable to anyone and shall be respected by all.

Constitution, the 1964 Constitution confirmed a dual court system which had been evolving since Amanullah's time. The primary courts (*mahkama-ye ibtidaya*) continued to be staffed by scholars trained in Islamic law and had general jurisdiction over civil and criminal cases (Weinbaum 1980). In addition there were a number of statutory courts in each province with special jurisdiction over fields such as administration and business (*ibid.*). Provincial courts (*mahkama-ye murafia*) had original jurisdiction and also functioned as appellate courts for the primary courts. What was new in the 1964 Constitution was the establishment of an independent Supreme Court (*Stera Mahkama*) in Kabul, with powers to review all lower-level decisions as well as administrative powers over the courts. This move towards an independent judiciary reflected the relatively liberal period in Afghan history under Zahir Shah.

The 1964 Constitution introduced another new institution, that of the Attorney General (*Loy Saranwol*), to conduct investigation of crimes. The Attorney General was to be established as an independent body of the executive power of the government, reporting only to the executive. The judicial branch was not to interfere in its activities (Yassari and Saboory 2010). Compared to previous arrangements, the 1964 Constitution also favoured statutory law over Hanafi sharia. Only when no provisions in the Constitution or law existed for a case under consideration could the courts apply Hanafi jurisprudence and then only within the limitations set forth in the Constitution. This, in the view of some, effectively made Afghanistan a secular state, even whilst paying lip service to Islam ( Dupree in Saikal 2004: 148).

The 1964 Constitution also made cabinet answerable to an elected parliament. Two elections to parliament were held; in 1965 and 1969. Voter participation was low and the intelligentsia could not compete with the traditional power-holders, who formed the majority of those elected. As a result, parliament and the elections functioned mostly according to patronage politics. The king's refusal to ratify a political parties bill also hampered the emergence of a political opposition, which continued to operate clandestinely, setting the stage for political developments in the years to come. Rather than the parliament, it was Kabul University that emerged as the arena for oppositional politics (Dorransoro, 2005). Here, leftist student groups clashed with Islamic radicals over the path to modernization most appropriate to their society. In 1973, political liberalization came to a halt with the overthrow of Zahir Shah by his cousin and former prime minister, Mohammad Daod in a military coup. Daod, who had come to power with the backing of pro-Soviet communists, proclaimed a republic, dismantled the nascent gains in representative government and took the country in an authoritarian direction.

In 1976 and 1977 as part of his ambitious plans to modernize Afghanistan socially and economically, Daod enacted new civil and criminal codes through decrees, which remained in force at the time of writing. These codes, which had been in the making for some time, represented another move towards the codification of Islamic jurisprudence. The Civil Code was essentially a codification of Hanafi fiqh (Etling 2004). The Penal Code also proceeded from Islamic law. In its introduction, the Penal Code says:

This law regulates the Tazir crimes and penalties. Those committing crimes of Hoodood, <sup>36</sup>Qassas and Diat shall be punished in accordance with the provisions of Islamic religious law (Hanafi religious jurisprudence).

The criminal code thus recognizes *Hadd* punishments although in practice these punishments were not generally applied. <sup>37</sup>

A new 1977 Constitution consolidated power in the hands of the executive and effectively made Afghanistan a one-party state. It was a prelude to Daod's purges of his erstwhile allies, members of the People's Democratic Party of Afghanistan (PDPA), whose competing factions then united in a bloody military coup against him in April 1978. The junior officers who had carried out the coup handed power to a Revolutionary Council and Afghanistan was proclaimed a Democratic Republic. Intending to transform the country socially and economically along socialist lines, the Revolutionary council enacted a number of decrees, most notably to effect land reform, compulsory education and women's emancipation. Decree number 7 banned child marriage and provided for a set punishment of six months imprisonment for violators (Hyman 1984). Some came to see this decree as the cause of large scale public outcry and the galvanization of support for the mujahedin (Malikyar 1997) although others point out that it was merely a repeat of what successive leaders had attempted earlier (Rubin 2002: 116).

The excesses of the de-facto PDPA leader, Hafizullah Amin, as well as the growing interests of regional rivals in weakening the PDPA government, prompted the Soviet Union to invade the country in December 1979. At that point, at least 12 000 people had been killed in political purges. A more moderate government was installed and another constitution promulgated 1980. In this, the Supreme Court was upheld and a parliament was provided for but its formation left to be decided for by subsequent laws. No reference was made to Islam as

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<sup>36</sup>Hudood is the plural form of hadd. On hadd, see foot note 32 in this chapter

<sup>37</sup>For a more detailed discussion about the content of these two codes and the gender relations they sanctioned see chapter 4.

a source of law, the Constitution merely provided its 'respect observance and preservation, and stipulated freedom of religious practice. (Tondini 2009: 36). The 1981 law on organization and jurisdiction of the courts for the first time also established a bar association, although lawyers had been operating in the country for some decades already (Weinbaum 1980). The PDPA government also set up a special court to try all counter-revolutionary activities. These revolutionary courts were closely linked to the intelligence services and functioned to persecute and eliminate political opponents. They continued to operate until their abolishment in 1990, marginalizing the regular courts (Rubin 2002; Moschtaghi 2006: 133). Material on how family law was adjudicated in practice during the PDPA period is scarce but Moghadam suggests that divorce was increasingly granted by progressive new family courts in the capital:

Although the divorce law never was announced officially, owing to the outbreak of tribal-Islamist opposition to the regime, family courts (*mahkama-ye famili*), mostly presided over by female judges, provided hearings for discontented wives and sought to protect women's rights to divorce and on such related issues as alimony, child custody, and child support.' (Moghadam 1999: 179).

As the Soviet Union leadership lost faith in the possibility of militarily defeating the mujahedin, they engineered a transfer of power to Dr Najibullah, tasked with overseeing a process of national reconciliation under which the Soviets could withdraw. Najibullah set out to replace Marxist ideology, reverting to more conventional frameworks of nationalism and Islam. Another constitution, which made no reference to Marxism and made Islam the official religion, was ratified in 1987. The Soviet military completed their withdrawal in 1989, yet Najibullah's government managed to stay afloat until 1992, when a sudden cut of funds led to fatal defections and the takeover of the capital by mujahedin factions.

The areas outside of government control and under the influence of the fragmented and often internally competing mujahedin movement had different forms of administration and governance. Although large amounts of external aid were channelled through the resistance parties (*tanzim*) headquartered in Peshawar in Pakistan, these parties mostly had little organizational structure inside Afghanistan (Giustozzi, 2009). Instead, local commanders jockeyed for position and outside supplies and entered into temporary alliances with the parties. In general, the war period gradually saw traditional leaders, landlords and notables being replaced by military fighters of more humble backgrounds, although Giustozzi (2009) suggests that these newer leaders often took to emulating the practices of the old khans;



distributing largesse for their followers, and indulging in competition over women and personal feuds (2009: 34). No systematic account of the operation of legal institutions in the areas controlled by the mujahedin resistance movement exists. Roy claims that in these areas, the ulama was able to reassert control over civil society, and that they, with the tacit acceptance of the resistance leaders gained more or less a monopoly over the administration of justice (Roy 1990) although Giustozzi, ( 2009: 37) suggests that military leaders often bypassed the local *qazis* or interfered in their decisions. Yet others emphasize the re-emergence or resilience of customary legal mechanisms (see below), as an explanation for the absence of the total collapse of Afghan society during conflict (Barfield 2003). Most likely the application of justice varied from place to place, reflecting the fragmentation of the mujahedin as a whole. Upon seizing control over Kabul in April 1992, a loose coalition of mujahedin leaders formed a government and declared Afghanistan an Islamic Republic for the first time in history. Notably, the mujahedin government immediately ordered women to wear covered up attire,<sup>38</sup> followed by a decree by the Supreme Court in 1994 which stated that women should not leave their houses unless absolutely necessary, and not wear attractive or revealing clothing<sup>39</sup>. However, as the capital collapsed into infighting, there were few possibilities to implement judicial administration of any kind.

The Taliban, who rapidly established control over much of the country fractured by competing mujahedin fighters and banditry, made Islamic justice and order the cornerstone of their claim to legitimacy during their rule (1996-2001). The exact composition and workings of the Taliban government remains opaque. However at its core were Pashtun rural mullahs and refugee boys educated in conservative madrassas in Pakistan. Although unevenly applied, their restrictions on women's movements and visibility were so extreme as to impose a virtual state of curfew on women ( Kandiyoti, 2007: 175). Apart from health workers, who were only allowed to treat female patients, women were banned from working and girls largely excluded from school. They were only permitted to venture outside dressed in the all-enveloping *chadari* (known as burka in the West) and escorted by a male relative. These restrictions were intended to prevent immorality and adultery and revealed an obsession with female sexuality

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<sup>38</sup> Following the collapse of the Najibullah government in 1992, the new government under Burhanuddin Rabbani issued an edict stating that: Now that...our Islamic country is free from the bondage of atheist rule, we urge that God's ordinances be carried out immediately, particularly those pertaining to the veiling of women. Women should be banned from working in offices and radio and television stations, and schools for women, that are in effect the hub of debauchery and adulterous practices, must be closed down.' Cited in Nawid (2007).

<sup>39</sup> The Sharia Ordinances on Veiling ( Fatawa-ye shara'i –ye mawrad-e hijab) Issued by the Afghan Supreme Court, 1994.

as a danger to be contained at all costs: <sup>40</sup> in the 1996 Ordinance Concerning Women's Rights and Duties, issued by the High Court ( Supreme court ) in Kabul, the government concluded that 'in brief, it is obscene and unlawful for women to go to school'. Even if women were fully veiled and their teachers were Muslim the edict continued, 'experience has proved that such deeds have had evil effects on women and have resulted to corrupted morality.' The edict stated that women were even forbidden to learn to write, 'for writing is a tool for sedition and corruption. Literate women write about their unlawful wishes and desires to strangers.' Thus, it was concluded, while there were some benefits women becoming literate, the seditious effects far outweighed these. The edict also prescribed, in great detail, the manner in which women should appear in public; veiled in a manner which made the contours of their body undetectable, refraining from using perfume, makeup or any kind of adornment, speaking loudly or to strange men, and a number of other actions presented as offensive, even threatening to public order. In any case, women were not to go out at all, lest they were religiously obliged to do so.

While the Taliban's gender policies bore similarities with those of the rural Pashtun milieu where many of them hailed from, they also differed in important respects. As Cole argues, the Taliban's policy constituted a counter-modernity rather than a return to the past (2008). Their Islamic Emirate of Afghanistan envisioned themselves as instituting an Islamic order, novel in Afghanistan's history, taking inspiration from the Taliban's notions of an Islamic golden age rather than a reinstatement of Afghan traditions. Their use of state technologies to violently enforce infractions against this order was similarly a novel thing. Another rupture was the ban on *baad* (giving women in marriage as compensation) and levirate (Cole, 2008), which signalled that Taliban, like Afghan rulers before them to some degree attempted to subordinate tribal power to central control.

The Taliban never promulgated a new constitution but declared their commitment to sharia and decreed a number of laws, particularly in the later phase of their rule. They established a notorious "vice and virtue" religious police modelled on and reportedly funded by Saudi Arabia (Watch 2001), who enforced, often violently and arbitrarily, the government's prescriptions for religious observance and the complete seclusion of women. The pre-existing

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<sup>40</sup>Nancy Dupree reports that these restrictions were first enforced in a haphazard manner; varying from region to region and dependent on personalities, the degree of accommodation with aid agencies and the level of administrative control ( Dupree, 1998). Restrictions became progressively harsher, in particular in the cities. Dupree also suggests that the written rules and regulations were mostly directed towards UN and NGOs. 'The general populace is informed of regulations over *Radio Shariat*'. (Ibid p. 156; foot note 41.)

three tier court system remained in place, but the Taliban eliminated the independent function of the Attorney General, and ignored many aspects of the Penal Code (Tondini 2009; Hartmann and Klonowiecka-Milart 2011). The Taliban supreme leader, Mullah Mohammad Omar held jurisdiction over capital punishments, which he could also impose outside of the court system (UN Commission on Human Rights 1998). Corporal punishments were occasionally implemented in public. In Kabul this took place on Fridays as a public spectacle and included the flogging and execution of women, unprecedented in recent Afghan history (Coomaraswamy 2000).

The formal legal institutions whose evolution has been outlined above have operated in parallel with informal or customary law practices commonly referred to as *jirgas* or *shuras*. *Jirga* is a Pashto word which refers to a local/tribal institution of decision-making and dispute settlement (Wardak 2004). A *jirga* could be held at various levels and occasions. In its ideal form, a *jirga* consisted of a group of respected male elders who collectively reach decisions – the embodiment of the egalitarian and autonomous ideology of Pashtun tribal society. The administration of justice through *jirgas* was generally focused on restoration, mediation and reestablishment of communal peace. In a murder case for instance, the role of the *jirga* would be to prevent a cycle of revenge, and it might decide on compensation or the marriage of women from the offender's family to the victims' to this end. Apart from the Pashtuns, other ethnic groups also have various forms of informal justice mechanisms (often referred to as *shuras*, *shura* being an word of Arabic origin for council or consultative process ), although Barfield argues that these have been less institutionalized than the Pashtun *jirga* (Barfield 2003) and often functioned in a closer relationship with state officials. To what extent the *jirgas* and *shuras* still had currency in contemporary Afghanistan was a matter of controversy and tied up with competing visions of statehood and nation. Thus, *jirgas* (and to a lesser extent, *shuras*) were heralded and almost mythologized by some as uncorrupted and authentically Afghan, and denounced by others as patriarchal and out-dated, particularly for the practice of exchanging women as compensation<sup>41</sup> ( See chapter 6).

As is evident from the preceding sections, negotiations and struggles over jurisdiction over women and gender violence have been profoundly shaped by the context in which they took place. The ideological resources and infrastructure of the first sustained attempts to move

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<sup>41</sup> The Taliban to some extent appropriated such 'customary' *jirgas* but, in accordance with their Islamic, anti-tribal image, renamed them *shuras* (of Arabic origin and associated with the early days of Islam) to give them a more religious appearance ( Jones-Pauly and Nojumi 2004).

women and kinship into the circle of state regulation by Abdur Rahman Khan (r. 1880-1901), who sought to establish a unified justice system as part of this efforts to centralize power was the sharia and the Islamic clergy. State appointed *qazis* were supposed to oversee marriage and divorce, to the extent that in theory no marriage could be conducted without their approval. Interestingly, there appears to be no record that suggests that these attempts to bring personal law under the ruler's purview fostered a particularly strong reaction. In contrast, the subsequent efforts by King Amanullah, (r. 1919-1929) to pick up and accelerate government regulation of women and marriage practices, is often regarded as instrumental in his overthrow. In turn, the reforms attempted by Amanullah, which included a ban of child marriage and polygamy, as well as a limit on bride price were not unlike the policies launched by the PDPA revolutionary government, who took power in 1978 and whose rule was also met with large scale and ultimately successful rebellions. The fact that opposition to these two governments coalesced around women's position has sometimes been taken to mean that there is some enduring mechanism or iron law according to which Afghan rulers who cross a certain line in their attempts to interfere in family questions will inevitably face their demise. However, it is important to examine the broader context that these attempts and the responses they solicited were rooted in. Amanullah was inspired by the modernizing nationalism that he had observed elsewhere in the Middle East and particularly in Turkey. His efforts to transform kinship and family; chiefly by stipulating a minimum marriage age, banning polygamy and criminalizing forced marriage were part of an overall project to forge a modern nation out of Afghanistan, modelled on Western attire, outlook and family relations. For the PDPA on the other hand, transforming gender relations were part of a larger socialist project to break landed and tribal power. The power bases of the two governments were also very different. Whereas Amanullah had no foreign support, a credential, although fading, as a pan-Islamic defender against British colonialism, and a weak army, the PDPA was to have the backing of the Soviet military force, and control of the Afghan army, but no moral repertoire that resonated with the population.

The conditions and coalitions that led to their demise also exhibited significant differences. The adversaries that finally unseated Amanullah were first and foremost the urban ulama, whose influence and relevance he attempted to destroy in his increasingly zealous attempts to rapidly modernize the country. However, his increasingly authoritarian approach meant that even old friends, such as the celebrated intellectual Mahmud Tarzi deserted him, and he was left with no allies to fight off his coalition of opponents. The PDPA came to power through a

violent coup and quickly alienated large segments of the population through its purges and then, by the Soviet invasion. It appears therefore, that the ‘woman question’, whilst important parts of successive modernization programmes, must be understood mainly as crystallized focal points around which both modernizers of various kinds and their opponents focused their effort, rather than the *causes* of the clashes themselves (Lough, with et al. 2012).

Again, the post-2001 order ushered in particular circumstances under which negotiations over women’s positions and their protection against abuses took place. Compared to earlier times, the context of this period was characterized by a new level of fragmentation. Various national and local actors made transnational alliances, which sometimes locked them in direct confrontation and at other times saw them quietly carrying out their agenda in the hope that their opponents would not take notice. Afghanistan became the site of an unprecedented number of contending sovereign claims (see chapter 1) which made the trajectory of individual cases and initiatives (of gender violence) all the more unpredictable and left considerable room for agency. In the section below, I describe the recent evolution of two important factors fashioning the struggles over gender violence; the transformations in the legal sector and framework and the arrival of an international gender machinery.

#### **IV. Legal reform after 2001**

After 2001, reform of the legal framework and the justice sector was attempted as part of the international statebuilding exercise. A number of legislative changes were undertaken, starting with a new constitution in 2004. In the more optimistic climate of the beginning of the decade, the new Constitution was acclaimed as a momentous achievement and decisive step forward in the Western-led reconstruction of post-Taliban Afghanistan. However the process surrounding its drafting and promulgation was not as democratic and inclusive as was claimed at the time. Although nationwide consultations were organized, the tight time schedule and the fact that the draft of the Constitution was not made available in advance meant that this exercise appeared mostly as symbolic window dressing (Suhrke, 2011). The US, Interim President Karzai and a bloc of military commanders dominated the subsequent Constitutional Jirga assembled in the capital to review and approve the document.

The new Constitution declared Afghanistan an Islamic republic. Article 3 stated that no law can be passed that contradicts ‘the beliefs and provisions of the sacred religion of Islam’, and

article 130 that Hanafi sharia should be used in cases where there are no provisions in the law, within the limits set in the Constitution. Article 130 would be frequently invoked by judges who claimed that it made references to the statutory laws redundant as long as verdicts were in accordance with Hanafi jurisprudence,<sup>42</sup> and allowed them powers to impose punishments beyond those prescribed in penal laws.<sup>43</sup> Significantly, the Constitution for the first time in Afghan history recognized Shia jurisprudence, stating that followers of the Shia sect could use Shia jurisprudence in personal law (article 131).

At the same time, noteworthy provisions were also made to safeguard women's rights. Article 22 stated that 'the citizens of Afghanistan – whether man or woman – have equal rights and duties before the law'. In addition, women were granted quotas at various level of representative government, roughly 25 and 17 percent of the seats in the lower and upper houses of parliament respectively, and 2 seats in each provincial council.<sup>44</sup> The Constitution also made frequent references to human rights. The preamble declared respect for the Universal Declaration of Human Rights and the Charter of the United Nations, article 7 stated that 'the state shall abide by the UN charter, international treaties, international conventions that Afghanistan has signed, and the Universal Declaration of Human Rights' and article 58 obliged the government to establish an independent human rights commission, although with no independent powers.

The 2004 Constitution thus contained components from across the broad spectrum of Afghanistan's past legal traditions; the Islamist orientation of the mujahedin and Taliban period, the emancipatory goals of the communist governments and a strong executive which had consistently been a feature of the country's institutional design. Like many other constitutions it was open to contradictory interpretations. It was especially ambiguous on whether Islamic jurisprudence, or whether principles of human rights including gender equality and principles of legality took precedence.<sup>45</sup>

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<sup>42</sup>For instance, Hartman (2011: 187 ) reports that Assadullah Sarwari, in the only case of prosecution for war crimes in Afghanistan to date, was sentenced to death with reference to this article, although the sentence was later changed to 18 years in prison.

<sup>43</sup>Article 130 reads: The courts in the cases under their consideration shall apply the provisions of this Constitution and other laws. 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 and within the provisions set forth in this Constitution render a decision that secures justice in the best possible way.

<sup>44</sup>Article 83 states that from each province, two of the elected members to the Lower House shall be females, whereas Article 84 states that from amongst the 1/3 of members of the Upper House who are presidential appointments, 50 percent must be women.

<sup>45</sup> However, the Supreme court was the institution authorized to interpret the Constitution.

Following on from the 2004 Constitution, numerous other laws were adopted. The Criminal Code of 1976 remained in place, but other new laws for regulating the criminal justice system, including the Criminal Procedure Law, the Police Law, the Prison Law, the Advocates' Law the Counter Narcotics Drug Law and the Law on Elimination of Violence against Women (EVAW law) were put in place. Efforts to reform family law also came from various quarters, as discussed in more detail in chapter 4. Legislative reform was accompanied by attempts to rebuild and reform the administration of justice. At first, the justice sector had been relatively neglected by the donor community, who instead focused their efforts on health, education and strengthening the security forces. An emergent international consensus to the effect that the justice sector had been neglected and constituted a weak link in the overall international attempts to restructure the country – partly due to the pathetic efforts of the Italians who had been in charge in the early years after the US-led invasion – was accompanied by calls for more sustained attention. A period of more extensive aid and a proliferation of 'rule of law' activities followed, but quickly led to Western disillusionment as rapid results failed to materialize.

The 2004 Constitution had largely confirmed the three-tier court structure and the historical positions of the three justice institutions, the Supreme Court, the Attorney General and the Ministry of Justice. The Supreme Court proved an assertive counterpart to the chaotic international attempts to reform the justice system. As an institution, it wielded considerable power. It nominated judges for presidential appointment, oversaw court administration, ran the professional training course (*Stage course*<sup>46</sup>) for judges, served as the final court of appeal and had the right to interpret the Constitution. A very high percentage of criminal cases went on to appeal in the Supreme Court. The head of its criminal division therefore, de facto presided over the fate of almost all criminal cases of a serious nature in the country, making the division a powerful actor and a target of undue influence. During my fieldwork, I often heard about cases, particularly where a government official stood accused of a crime, which had proceeded through due process at lower instances, only to be obviously influenced at the Supreme Court level resulting in acquittal or reduced sentencing.<sup>47</sup>

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<sup>46</sup> A *stage course* is post-degree training program leading to a qualification to serve as a judge, prosecutor or lawyer. A French term, its usage in Afghanistan reflects similarities with the French legal system- both countries have civil law systems.

<sup>47</sup> A 2008 presidential decree further strengthened the Supreme Court authorising it to increase or decrease punishments. Prior to this, the Supreme Court had only been only allowed to check cases for legal accuracy.

The Supreme Court was generally considered a bastion of conservatism, at least by Western reformers, in particular during the tenure of Fazal Hadi Shinwari, the Chief Justice from 2001 to 2006. As a testimony that the close relationship between the justice system and the religious establishment was still in place Shinwari was also the leader of the national Ulama Council. The Council was generally supportive of the president and Shinwari had close ties to Abdul Rasool Sayyaf, a jihadi commander and Wahabist inspired religious scholar with considerable power in the post 2001 settlement and an important ally to Karzai. During his tenure Shinwari – who had no formal qualifications beyond madrassa education – established a religious council within the Supreme Court. The council issued a number of fatwas (binding religious opinions)<sup>48</sup> that horrified liberal Westerners and Afghan human rights advocates and in 2006, the donor community and some of its allies succeed in placing a more moderate person as the Chief Justice, Abdul Salam Azimi. However, the new Chief Justice proved disappointing to many of his backers. He spent a lot of his time abroad and proved unable to carry out the substantive reforms his supporters had hoped for, whether those were countering the cronyism in judicial appointments or re-orienting training and staff appointments in a more liberal direction. It was evident that the Supreme Court exhibited a certain degree of *esprit de corps*. It was able to guard its autonomy against outside attempts to redesign criteria for professional requirements for its cadres, and against encroachments on its jurisdiction (see chapter 6). It proved less inclined to resist influence from the executive and proved a reliable ally to President Karzai, in particular in his attempts to sideline and manipulate parliament. The profession as a whole was heavily male dominated. In 2009, it was estimated that around six percent of sitting judges were female (O'Hanlon and Sherjan 2010: 93). Most of these were presiding over family and juvenile courts.

The Attorney General's Office (AGO) was also a fairly powerful institution, appointing and overseeing prosecutors at all levels. Under the executive arm of the government, the Attorney's Office was responsible for investigating crimes, preparing them for trial and acting as the prosecutor in court. By 2010, the attorneys had not undergone restructuring as in the case of the judges, and as a consequence had much lower salary levels than those of latter. Of the three justice institutions, the Ministry of Justice constituted the minor actor, tasked with

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These sessions were also attended by the representatives from the Attorney General's Office but neither the accused, nor defence lawyers were allowed to attend.

<sup>48</sup> For example, Abdul Rahman indicted under Article 130 for apostasy, was eventually declared mentally ill and taken to Italy. Sayed Pervez Kambash, found guilty under Article 130 for blasphemy, was first given the death penalty, later reduced to the maximum prison sentence. He was pardoned by the president and repatriated to Norway. Two people charged with blasphemy were sentenced to twenty years in prison under Article 130. See Hartman (2011).



drafting laws through its *Taqnin* department and with overseeing the administration of the justice system. After 2001, defence lawyers and legal aid featured as relatively new aspects of the justice system. A national bar association was re-established in 2008, and an Advocates Law promulgated with the support of the International Bar Association. Numerous national and international organizations provided representation in court for defenders, or legal advice, funded by international aid money.<sup>49</sup> Although lawyers often complained that they were met with little respect and outright hostility by judges and prosecutors, it appeared that the idea of legal representation was gaining increasing traction. In general, lawyers were of a noticeably different background than the other legal professions. Most were graduates from the secular law faculties, and many spoke English and held positions in foreign-funded NGOs. Some had gained reputations as fearless defenders of human rights, whereas a few of the legal aid organizations were perceived as mostly motivated by financial gains.

Various experts and expat advisors frequently lamented the lack of coordination characterizing attempts at justice sector reform, but this state of affairs was in fact exacerbated by the proliferation of aid. As Tamanaha points out, justice sector aid is not a field with an internal logic, it is better understood ‘as an agglomeration of projects perpetuated by motivated actors supported by funding.’ (Tamanaha cited in (Mason 2011: 10). More often than not, external support to the justice sector took the form of what aid organizations and private contractors were able to secure funding for and to provide, rather than what national strategies or needs dictated. Kabul was swamped with a number of short legal training courses provided by various donors and organizations, criticized for being superficial, supply-driven, uncoordinated and overly focused on criminal law. This kind of training was rarely evaluated and typically conducted without a baseline, making it difficult to assess its impact. Generous *per diems* (daily allowances, ostensibly to cover travel, but in reality serving as a monetary incentive for staff to attend) made many institutions keen to secure training places for their staff and reinforced the appearance of a training *industry*. The three justice institutions often competed for funds and influence and to a certain extent, succeeded in playing donors off against each other. Most assertive was the Supreme Court, who blocked an attempt to establish a joint *Stage* course and instead negotiated a bilateral deal with one of the donor agencies.

The influx of foreign assistance also dramatically shaped the legislative process. As reforms in the area of ‘rule of law’ had gathered pace and large donor –funded programmes were established, international consultants and aid workers often became involved in what Hartmann and Klonowiecka-Milart (2011: 282) term ‘resumé law reform’. In the justice sector reform field in Afghanistan, as with the aid industry more generally, tangible results was what mattered; both in reports sent to headquarters and funders and on the CV’s of staff and consultants, who typically were on short contracts. Drafting laws was an appealing activity in such a context. Laws were relatively straightforward to produce for expat staff and they represented a concrete achievement. It was such rationales, rather than coherent efforts to improve the Afghan legal framework overall, that often drove the production of new laws. (Chaudhary, Nemat et al. 2011). At other times they originated in the specific preoccupations of small groups of Westerners or Afghans, resulting in stand-alone laws on money laundering, terrorism, anti-corruption and anti-narcotics.

In total, more than 200 laws were promulgated in the period 2001-2010.<sup>50</sup> Many of these had been conceived and drafted in their entirety by actors outside of the Afghan government. (Chaudhary, Nemat et al. 2011). Through political pressure and informal lobbying laws were typically then enacted through presidential decrees ( *ibid.*).<sup>51</sup> Often drafters did not amend or even consult the existing legal framework, instead merely ‘using as a transitional provision an omnibus clause that declared as abrogated any laws that were contrary without listing the laws and provisions that it abrogated’ (Hartmann and Klonowiecka-Milart 2011: 279), a habit which produced incoherence and inconsistency in the legal corpus as a whole. Such practices also reinforced the opaque dynamics of legislative processes, where informal connections to the president and access to his gatekeepers were key determinants. (Chaudhary, Nemat et al. 2011). At the same time, the entire justice system was eroded from within by the proliferation of organised crime and in particular the profitable narcotics trade.

Towards the end of the decade, international interest in the justice sector took a novel turn as the military claimed that shortcomings in this area were an important cause of the insurgency. In line with a new military doctrine, all sectors of the government had to be seen as legitimate

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<sup>50</sup> *Finding aid for Afghanistan legislation and translations*, Royce Wiles, Afghanistan Research and Evaluation Unit (AREU) ( unpublished overview)

<sup>51</sup> In fact, I was told that the US embassy had one summer sent an email out to various international aid organizations and actors in the rule of law field, wondering if anyone had suggestions for laws that they wished to see enacted as presidential decrees before the parliament was due to return from their recess. ( Once parliament was in session, laws could not be enacted as presidential decrees but had to be presented to parliament first. See chapter 4 for more detail.) Personal communication, former UNODC staff, Kabul March 2012.

and effective in order for the population to support it. The urgency invested in reforming the legal system led to reinforced calls for international support to informal justice processes, amidst claims that there was simply no time to wait for the formal system to develop. This saw the proliferation of international, ad-hoc attempts to cultivate conflict resolution through jirgas and shuras and to formalize their status through a national framework, chronicled in chapter 6.

The insurgents, for their part were targeting justice officials as part of an overall campaign against the government. In many districts of the country, posts went unfilled whereas in provincial capitals judges and prosecutors were working under siege, holed up in fortified compounds and in fear of their lives. Furthermore the Taliban insurgents were setting up their own courts and dispute settlement mechanisms in areas under their control, leading to fears amongst NATO officials that they were being outcompeted in what they saw as ‘the justice field.’

#### **IV. International gender activism: post-2001 Afghanistan as a site of international gender expertise**

Intersecting with the muddled attempts at judicial reform were efforts to promote another objective favoured by Western donors and organizations; gender equality and women’s rights. Although the invocation of Afghan women’s plight by Western rulers at the time of the 2001 US-led invasion might have been mostly instrumental, the years that followed nevertheless saw an unprecedented international interest in the condition of Afghan women.<sup>52</sup> Thus, whereas ‘post- conflict’ reconstruction interventions are often criticized for ignoring the dynamics of gender and women’s needs, in Afghanistan the international donor community was unusually gender-focused (even if their commitment to women’s right often had to cede ground when in conflict with other priorities). The foremost mechanism through which this interest was channelled was the established bureaucratic practices of international gender expertise. The current paradigm of such expertise, *gender mainstreaming*, was identified as a main method of achieving gender equality in Afghanistan. An approach centred on the institutionalization of a gender agenda within all sectors of public policymaking, gender

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<sup>52</sup> There has been a great deal of commentary and writings which points to the cynical appropriation of Afghan women’s suffering by Western geopolitical agendas, and the orientalist imagery, focus on the burka, and denial of agency employed in such discourses ( See for instance Abu-Lughod 2002; Ayotte and Husain 2005; Stabile 2005; Schueller 2011).

mainstreaming was reiterated in the various policy documents that set out strategies, timetables and benchmarks of the internationally devised reconstruction process. It was to be realized through technocratic measures such as ‘the establishment of gender units, gender focal points and working groups in mainline ministries and creation of inter-ministerial task forces, to co-ordinate various donor-funded programs’ ( Kandiyoti, 2009).

Charged with mainstreaming gender into the policies and programmes of line ministries was the Ministry of Women’s Affairs (MOWA). Mandated in the Bonn agreement, MOWA became a focal point for gender targeted donor assistance. The Ministry, which had no core budget, was filled with a number of foreign advisors and Afghans ‘embeds’ (Afghan staff in international organization seconded to the Ministry) and its achievements proved modest. It suffered from what was probably a deliberate strategy of appointments from the president who did not want a strong minister in what was a controversial field, and was completely dependent on donor funding. However the MOWA’s offices in the provinces<sup>53</sup>; the Department of Women’s Affairs ( DOWA) sometimes played a role in helping women who were in conflict with their families or had other problems. The effectiveness of DOWA in such situations was generally determined by personalities and the local security situation ( see chapters 5 and 7).

The bulk of the implementation of the international gender interventions was subcontracted to a myriad of international and national NGOs, staffed or led by Afghanistan’s fragmented local women’s activists, many of whom had recently returned to the country after living as refugees in neighbouring countries. The ‘NGO-ization’ of local gender activism had effects similar to other cases; bureaucratic requirements for programme design and reporting sometimes took priority over local political mobilisation for social change. Often, development of technocratic capacity impeded or overrode political capacity building. Equally if not more importantly, competition for funding and recognition within civil society tended to undermine coalition-building and information-sharing among civil society groups, especially when combined with the existing patronage logic of much of Afghan politics (Azarbaijani-Moghaddam 2006).

MOWA’s relationship to NGOs and women activists was generally one of mistrust and sometimes competition. Staff at the ministry accused foreign-funded NGOs of resisting government coordination and operating according to their own whims whereas the latter

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<sup>53</sup> Most Afghan ministries have a department in Afghanistan’s 34 provinces. These departments implement programmes according to plans and budgets decided by parent ministries in Kabul.

contended that MOWA attempted to monopolize the gender field and did little to solicit the opinions and skills of civil society. There were however, deeper structural reasons for difficulties and tensions besetting women's rights activism in Afghanistan. As Kandiyoti perceptively argues, discourses of women's rights in Afghanistan had evolved alongside different and often parallel tracks. The crude and sudden interest in the plight of women in Afghanistan expressed by Western powers on the eve of the 2001 military operation proved deeply divisive in international feminist circles. Centering on the politics of representation and the entanglements of feminism in imperial projects this was mostly a conversation taking place in the West, with participants talking to each other 'through Afghan women' (Kandiyoti, 2009). The donor driven gender activism producing the policy plans and programmes for ensuring gender equality also had limited bearing upon the actual practices of Afghan government officials. One report for instance noted that

...there is no sense that MoWA can actually deal with the relevant benchmarks or that the appropriate change agents have been or can be identified. This amounts to a de facto social exclusion at ministerial level where non-English speakers, those who do not understand jargon, and those not comfortable with the paperwork and reporting inherent in national policy development are actually left out of the 'development' process and political dialogue (Azarbaijani-Mogaddam, Pinney et al. 2008: 30 )

At the same time, national actors, in particular women, at constant risk of inviting charges of being Westernized, ruining the family and of promiscuity, often consciously distanced themselves from international frameworks and support when they participated in political debates inside the country. These schisms notwithstanding, there were certainly important transnational dimensions structuring the way in which local struggles and negotiations over gender violence in Afghanistan were acted out. But the impact of international processes, presence and discourses proved highly ambiguous, unpredictable and even contradictory. They formed part of the extraordinarily fluid terrain on which episodes of gender violence were being played out. The limited and contested reach of the Afghan state apparatus, the polarized ideological landscape and the fragmented public discourse were other crucial parameters.

Contestations at the national and local level over legislation and interventions in gender violence thus saw alliances and confrontations along a variety of lines. Legislators, activists, legal officials, aid workers, women and their families carved out spaces to stake their claims, utilized the discursive possibilities available to them, mobilized institutional resources in

ways that they could, made discreet or overt alliances and appealed for authorities to honour obligations framed in various ways. There were instances when coalitions of Afghan women's activists and their Western allies managed to score important but perhaps tenuous victories, whether in individual cases, over legislation or in government policy. At other times, it was clear that the donor community constituted far from a monolithic bloc or reliable partner, as the attempts to strengthen informal justice, considered antithetical to women's rights, by parts of the expat community, testified to. At the local level some individual episodes of gender violence evolved without contact with either government or international actors, while others encountered them in variegated ways. At stake in all these efforts were the type of gender relations to be publically sanctioned, and the powers invested with authority to enforce these standards. It is the trajectories and various fates of these open ended processes that this study explores.

## Chapter 4: ‘Good women have no need for this law’. The fortunes of the ERAW Law

### I. Introduction

On 19<sup>th</sup> July 2009, President Karzai signed two laws. One was a revised version of the Shia Personal Status Law, which had created an uproar both in Afghanistan and abroad for its conservative articles on gender relations. The Shia law, despite having undergone a review triggered by the protests of women activists and donors, still contained a number of articles which these groups considered problematic when signed again by the President in July 2009 (see chapter 2, section IV). This final version appeared to sanction underage marriage, made women’s right to marry dependent on their fathers or grandfathers permission, and constructed a martial relation in which wives were supposed to submit to sexual relations on demand lest they forfeit claims of maintenance from their husbands.<sup>54</sup>

However, the other law signed the same day was considered a triumph by many women rights activists. It was the Law on the Elimination of Violence against Women, (*Qanon-e maneh khoshonat alie zan*), normally referred to as the ERAW law in English. When decreed in 2009, the law had been in the process of drafting for four years. It was unprecedented in Afghan history, listing 22 acts as violence against women and mandating punishments for them. It also obliged the government to take specific actions to prevent violence and to support its victims.

The ERAW law was regarded as important because, unlike the existing Penal Code, it designated rape (*tajavoz-e jinsi*) as a crime distinct from consensual adultery,<sup>55</sup> provided considerably stricter punishments for forced and underage marriage, and criminalized a number of violations of women’s civil rights, such as the deprivation of inheritance or preventing a woman from attending work or education. In general, the law was regarded by many as an important tool of advocacy, signalling that women were independent holders of rights that the Afghan state had an obligation to protect from abuses at the hands of families.

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<sup>54</sup> UNAMA Human Rights – *Concerns on Shi’a Personal Status Law*, 18 August 2009. UNAMA document on file with author.

<sup>55</sup> The 1976 Penal Code was unclear on the difference between consensual adultery and rape. See below

Although the existing Penal Code covered crimes such as beating and murder, those who supported the new law argued that there was a tendency in legal practice and more broadly in Afghan society to view such acts as problematic only when they were carried out by non-family members. For them, the law was important because it explicitly stated that these actions were also punishable crimes when they took place inside the family.<sup>56</sup>

In this chapter I explore the significance of the EVAW law. I ask whether and to what extent the law challenged prevailing gender relations by making the state responsible for enforcing a new set of standards for women's rights. Did the EVAW law signal a transformation whereby women were constituted as legal persons in their own right, under state protection and where family authority over women was replaced, or at least modified, by that of the state? As my analysis will make clear, such questions cannot be answered unequivocally, and this ambiguity is an essential part of the story of the EVAW law.

After providing some essential background information on the existing legal framework and the complicated history of the EVAW law, I start my analysis by looking at the substantive debates about the law, the actual text of the law and its proposed and accepted revisions. However, it is in the *processes* through which the EVAW law was promoted and implemented that the key to understanding its significance lies. These processes demonstrate how meaningless it is to talk about a singular state authority in contemporary Afghanistan. The fact the EVAW law was contradicted on several points by the Shia law, and yet President Karzai signed them both at the same day and at the same gathering was an indication of this. That the president should almost simultaneously sign two laws in direct contradiction with each other was remarkable. It was one sign that even if ratified, the EVAW law would only serve as a partial and ambiguous framework for the public regulation of gender violence in Afghanistan.

I show why and how this was the case by tracing how the EVAW law was conceived, promoted, contested, revised, and implemented. Important aspects of women's rights activism, the logics of legal reform and the political landscape in Afghanistan are revealed by chronicling and disentangling these processes. I find that the particular dynamics of these fields and their contingent interactions gave form to a partial 'EVAW law assemblage': In the context of a polarized political climate, the intimidating ascendancy of jihadi leaders who were able to dominate broader public debate (empowered to a great extent by international

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<sup>56</sup> Ali Reza Rohani, presentation at seminar on EVAW law, Kateb University, Kabul, 16 December 2009, Interview # 57



intervention *and* resentment against it), external dependence, the precedent of getting laws passed through political informal pressure instead of consensus and debate, the importance of claiming personal credit and needing to produce ‘output’, the law’s supporters eventually chose a discreet and top down strategy. The supporters of the law abandoned the attempts to get parliamentary approval and to rectify technical limitations in the text. Instead, the EVAW law was maintained as a presidential decree and its technical weaknesses ignored for the moment. The mechanisms that were involved in the push for implementation of the law similarly revealed a top-down, discreet mode of action in which external support to some degree compensated for the lack of broader national anchoring.

## II. The legal framework prior to the EVAW law

At the time that the EVAW law was drafted Afghanistan had civil and criminal codes in place dating from the late 1970s. The Criminal Code (1976) regulated *tazeer* crimes, one out of the four categories of crimes and punishments under classic Islamic penal law, which are as follows; *hadd*,( singular of *huddod*, crimes for which immutable punishments: amputation, stoning and lashing, were prescribed) *qisas* (crimes where relatives or victims were allowed retaliation), *diat* (liable to compensation or ‘blood money’) and *tazeer* (crimes where punishments were discretionary, and for purposes of prevention and deterrence).

In earlier times, punishments for *tazeer* crimes were left to the discretion of the judges, who, based on their knowledge of *fiqh* (Islamic law) would adjudicate autonomously. However, Afghanistan, like many Muslim countries in modern times (Zubaida 2003) had codified *tazeer* crimes in the form of a criminal code. Thus the ulama were deprived of their earlier right to adjudicate *tazeer* crimes autonomously, whereas the Islamic prescriptions for those crimes falling into the three other categories were (at least in principle) upheld and therefore formal adherence to classical Islamic penal law secured. The Afghan Penal Code from 1976 did exactly this when it stated in its preface: ‘This law regulates Tazeeri crimes and penalties. Those committing crimes of Hudood, Qisas and Diat shall be punished in accordance with Islamic religious law (the Hanafi religious jurisprudence)’<sup>57</sup>. In reality, punishments derived from the last three categories were only systematically enforced during the Taliban

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<sup>57</sup> To my knowledge there is only one available English translation of the Penal Code. This can be found at [http://www.mpil.de/ww/en/pub/research/details/know\\_transfer/afghanistan\\_project/legal\\_documents/criminal\\_law.cfm](http://www.mpil.de/ww/en/pub/research/details/know_transfer/afghanistan_project/legal_documents/criminal_law.cfm)

government. Yet it appeared to have been a common assumption, also post-2001, that Afghanistan's courts retained the opportunity to apply all four categories and that therefore the legal framework was in accordance with classical Islamic law.

Apart from general articles on bodily harm and murder, there were several articles in the 1976 Penal Code explicitly related to gender violence. Article 398 stipulated a significant reduction of punishment in cases of murder if the victim was a relative or spouse caught in the act of adultery:

'A person, defending his <sup>58</sup> honor (*namus*) who sees his spouse, or another of his close relations, in the act of committing adultery or being in the same bed as another and immediately kills or injures one or both of them, shall be exempted from punishment for laceration and murder but shall be imprisoned or punished for a period not exceeding two years, as a Tazeeri punishment.'

Section 2, chapter eight; 'Adultery, Pederasty and Violation of Honor' <sup>59</sup> contained provisions regarding rape and adultery. First of all, article 426 provided for *hadd* punishments of adultery, stating that if in the crime of adultery the conditions for *hadd* are not fulfilled<sup>60</sup> or the charge of *hadd* is dropped (..) the offender shall be punished according to the provisions of this article'. The Hadd punishment for adultery is death penalty (by stoning) for those who are married, and lashing for those not married. <sup>61</sup>

Articles 427- 428 set out the punishments for 'adultery and pederasty' (long term imprisonment, i.e. no less than five years and no more than 15) <sup>62</sup> and various aggravating

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<sup>58</sup> Dari is a gender neutral language, which does not distinguish between gender in personal pronouns. The article could equally be translated as 'A person, defending her honor, who sees her spouse. However, the article was understood to refer to men only. A woman killing her adulterous husband or male relative claiming defense of honor would make little sense, since male relatives' sexual behavior did not reflect on women in this way. Moreover, as one of my informants stated, to kill men caught in adulterous behavior on the spot was perilous, because, men had to right to enter into polygamous marriages, and one could not know if they had not recently married the woman they were found with. Interview #34.

<sup>59</sup> *Zina, lawat va hatke namus*

<sup>60</sup> Normally held to be four witnesses or a voluntary confession, but not specified in the code.

<sup>61</sup> *Hadd* crimes (God-defined crimes) are crimes where punishments are regarded as immutable. Scholars and Islamic judges have nonetheless understood the evidential requirements and exact definitions of and punishments for these crimes differently. Crimes normally categorized as *hadd* include *zina*, ( adultery) *sariq* ( theft) , *harida* ( violent theft) *qafz* ( false accusation of *zina*), *ridda* ( apostasy) and *shurb kamr* ( consumption of alcohol) Punishments are corporal (such as lashings, amputations and stoning). (Peters, 2005: 53). In theory, this means that extramarital sex only is 'zina' when certain conditions are fulfilled ( normally a personal, voluntary confession, or four witnesses to the act of penetration.) However, in everyday speak, many Afghans refer to all extramarital sex as *zina*, and the Penal Code also refers to adultery as *zina*.

<sup>62</sup> The Penal Code contains 6 forms of 'Principle Punishments'; 1. Execution, 2. Continued imprisonment ( 16-18 years) 3. Long term imprisonment ( 5 -15 years) 4. Medium term imprisonment (1-5 years) 5. Short term imprisonment ( 24 hours to 1 year) and 6. The payment of a fine.

conditions. The use of the term ‘adultery’ ( *zina*) to seemingly include both rape and consensual, extramarital sex, means that there was effectively no legal distinction between consensual adultery and rape in the code. In addition, article 429, perhaps referring to attempted rape or sexual assault, stated that a person who, ‘through violence, threat or deceit, violates the chastity ( *namus*) of another or initiates the act’, shall be sentenced to long term imprisonment not exceeding seven years.

Article 517 criminalized forced marriage (but only when the woman involved was of majority age). It also provided for stricter punishments if forced marriage happened under the pretext of *baad*:

‘1) A person who gives in marriage a widow, or a girl who is 18 years or older, contrary to her will or consent, shall be sentenced in view of the circumstance to short imprisonment. [up to one year]

2) If commitment of the crime specified under the above paragraph is for the purpose of “*Baad dadan*” (as a compensation for a wrongdoing) the offender shall be sentenced to medium imprisonment not exceeding two years.’

Finally articles 418-424 of the code stipulated stronger punishments for the kidnappings of girls than of boys, stronger yet for the kidnapping of women, and stronger still if the woman is married or if the ‘act of adultery’ is committed. However, article 425 stated that if that a person who carries off a girl over 16 ‘at her own will, from her parents residence, for the purpose of lawfully marrying her, shall not be deemed as having committed an act of kidnapping’. This appeared to be reinforcing the right of a woman to contract a marriage without the consent of her family.

As argued in chapter 2, civil and criminal law must be analysed together in order to understand legal constructions of women’s subject positions and relations of gender and sexuality (Gangoli 2007). For instance the legal impossibility of marital rape, together with civil codes which substitute the need for a bride’s consent to marriage by that of her male guardian, or stipulate wifely duties to sexual submission might combine to affirm kinship control over female sexuality and produce forms of sexual coercion hidden from public and legal recognition.

The Afghan Civil Code of 1977, modelled on the Egyptian civil code of 1949 (Yassari and Saboory 2010) defined marriage as an ‘a contract that legalizes intercourse with the object of

starting a family’<sup>63</sup> and thus reinforced that extramarital sex was criminalized. At the same time, there were several provisions that made forced or underage marriage invalid. The code set the marriage age for girls at 16. The law allowed for the marriage of a girl at 15 provided the marriage is concluded through her father or the competent court, but stated ‘that the marriage of a minor girl whose age is less than 15 shall never be permissible’ ( article 71), so that an absolute minimum age of marriage was set at 15. The code also recognized the woman as a party to the marriage contract.

The Civil Code, like the Shia personal status law decreed in 2009, established a marital relation, common in sharia-based family law, where the wife’s obedience, including in conjugal matters, was rendered in return for financial maintenance from the husband. The law stated that a woman loses her right to maintenance (from the husband) in cases where she does not submit to ‘conjugal duties’ (meaning sexual intercourse with her husband) or leaves the house without her husband’s permission ( article 122). The Civil Code also established unequal rights to divorce for husband and wife. As in many other codifications of sharia, the husband was granted the right to unilateral divorce through the three time pronouncement of *talaq* (*I divorce thee*) whereas the wife could only be granted separation by a court, based on demonstrable injury by, or the insanity or impotence of the husband.

Polygamy was recognized in the Civil Code, but with significant preconditions; when there was no fear of injustice between the wives, when the husband was financially able to maintain the wives, and when there was ‘legal expediency’ exemplified in the code by infertility or a serious disease suffered by the first wife.<sup>64</sup>

The legal framework as set out in the Criminal and Civil Codes in many respects established a direct relationship between the woman as a (gendered) citizen and the state. Although the Penal Code was very vague, women were accorded the right of protection from (extra marital) rape as individual subjects. By explicitly referring to her consent to marriage, the Civil Code similarly recognized the woman as an independent rights bearer and juridical person. The requirement for a woman’s consent in marriage, the stipulation of a minimum age for marriage and criminalization of marriage without consent also meant that certain other practices enabling sexual coercion (forced marriage) were prohibited by law. However, forced

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<sup>63</sup> Article 60.

<sup>64</sup> Polygamy is common in Afghanistan compared to neighboring countries like Pakistan or Iran. Some of the female MPs defending the EVAW law had suffered the public humiliation of becoming co-wives, often too much younger women.

marriage was only a criminal act when the woman was above 18 so that families could seemingly not be punished for the forced marriage of daughters below this age. Moreover, once married, a woman had legally surrendered the right of her body as far as her husband was concerned. Marital rape was a legal impossibility and perhaps even positively sanctioned by the article on maintenance,<sup>65</sup> echoing Haeri's observation that the standard Islamic marriage contract must be understood as a commercial contract between the bride and husband. The bride is not the actual object of exchange but, as a party to the contract, the one in *possession* of the object; her sexual organ (Haeri 1989). Thus, although a women's sexuality is objectified, she is still a recognized subject in the sense that she is admitted to exercise free will and to have the ability to 'guard', and dispose of (through marriage) her sexuality. In fact, through criminalization of adultery a woman might be punished for her actions regarding this matter. Indeed, the legal framework in Afghanistan criminalized adultery, and thus limited admissible sexual relations to those within marriage. A main preoccupation was clearly centred around reproduction and paternity. Sexual relations were understood as heterosexual intercourse and the status of the marriage was bound up with whether this act had taken place.<sup>66</sup>

In sum therefore, the legal framework prior to the EVAW law to a large extent constituted women as independent legal persons. The general provisions for murder, beating and injury did not differentiate between men and women, although in practice, intra-family violence was normally regarded as less serious crimes, if considered as crimes at all. Article 398 of the Penal Code also made wide ranging concessions to notions of female sexual conduct as a legitimate concern for male relatives, to be reasonably sanctioned through violence.

Rather than amending these existing provisions, the EVAW law supporters opted for a new law, one which would directly criminalize various forms of violence and abuse considered problematic. There were numerous reasons for choosing this strategy, and before turning to the substantive points of debate over the text of the EVAW law, the chapter provides a history of the law and the processes through which it evolved.

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<sup>65</sup> However, the incorporation of certain aspects of Maliki law on divorce means that a woman might request the court for a divorce if her husband is injurious to her, including during intercourse (Kamali 1985).

<sup>66</sup> The 1977 Civil Code contains detailed provisions on the relationship between divorce and validity of marriage and 'completed' intercourse.

### III. The trajectory of the EAW law

Although it proved difficult for me to establish the exact time and place for the initial conceptions of the EAW law, most of my informants traced it to meetings in the Afghan EAW Commission shortly after the commission had been established in 2005.<sup>67</sup> The EAW commission was modelled on UN-directed efforts to combat violence against women elsewhere, in turn part of a broader global campaign against gender violence. The commission was established by the Ministry of Women's Affairs (MOWA) and UNIFEM with the view to coordinate government responses to violence against women. Often discussing reprehensible individual cases, a consensus seem to have emerged in the commission that a new law that explicitly criminalized violence and abuses against women was needed.

The first version of the EAW law was drafted by the legal department of MOWA, who officially submitted it to the *Taqnin* (legal drafting<sup>68</sup>) department in the Ministry of Justice on the International Women's Day in 2006. UNIFEM (who had a large programme on gender-based violence and also worked closely with MOWA on various issues) and many of the civil society organisations in Kabul had not been included in the drafting process, something which they viewed as an attempt by MOWA to retain control over the law as its own initiative. One of the Afghan activists stated:

*I don't know who had the original idea, but what I do know is that in 2005, MOWA started to draft a law. They invited the Supreme Court, Kabul University, people from the Ministry of Justice. This law was more like a code of ethics, very vague, a very weak law. They were hiding it from civil society. Civil society only got a copy of it around women's day, when the draft was presented to the media.<sup>69</sup>*

In a bid to create a stronger law, a group of civil society activists, together with UNIFEM started to work on a revised draft, which MOWA reluctantly presented to *Taqnin* in late 2007.<sup>70</sup> However, shortly after, yet another draft was submitted by parliament's Women's Affairs Commission. This draft, no more than four pages, was perceived by other participants in the process as a blatant attempt by the female MP chairing the Commission to counter criticism that she could point to no tangible achievements so far in her role as chair. She

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<sup>67</sup> Some of the material on which this section is based was also used for Chaudhary, Nemat, et al. (2011).

<sup>68</sup> literally "making a code ( *qanun*)".

<sup>69</sup> Interview #6.

<sup>70</sup> According to the Constitution only the government ( including ministers ) or the parliament could submit laws to the *Taqnin*.

herself denied this, stating that she had been unaware of the draft others had produced and merely had wanted to give Afghan women ‘a gift on women’s day.’<sup>71</sup>

The *Taqnin* set out to create a single version from the three competing drafts, effectively discarding the third, shorter version from the Women’s Commission in parliament. In early 2009, as the *Taqnin* was nearing the completion of its work on the EVAW law, concern over the Shia Personal Status law was deepening and women activists and donors started to look to the EVAW law as a possible counterbalance. The Shia law had created a storm in Afghanistan and abroad when details about it leaked to the international press. The law had its origin in the Constitution’s article 131, which recognized the right of Shias to apply their own jurisprudence in matters of family law. This was a breakup of the monopoly that Sunni jurisprudence had hitherto maintained in official Afghanistan, and to many Shias, it represented a historical recognition of their existence. Predictably, when an initiative to codify a personal status law based on Shia (Jafari) jurisprudence got underway, it quickly became entangled in identity politics (Oates 2009; Chaudhary, Nemat et al. 2011). Drafted under the supervision of prominent Shia cleric Asif Mohseni, seemingly on his own initiative, the law was an excessively detailed and conservative codification of Jafari fiqh. Amongst its contentious articles were provisions compelling wives to sleep with their husbands every fourth night and to apply makeup on their husbands’ request, articles stating that women could not leave the house without their husbands’ permission, that obedience and sexual submission were obligatory in order to receive maintenance, and a number of articles acknowledging marriage with minor girls.

The Shia law passed through parliament in obscure circumstances, prevented from proper distribution and discussion. Many Shia MPs were told that the important thing was to get a separate family law for Shias, and that questioning the content of the law should be avoided as this risked derailing the entire process. Conservative Sunni MPs argued that as Sunnis, it was not for them to debate the law, and MPs with a more secular outlook struggled to obtain copies of the draft and to find out when and where debates about it were taking place. (Chaudhary, Nemat et al. 2011). As the law was quickly passed in both houses of parliament and were signed into force by the president, details about it eventually appeared in the international press, creating an outrage in Western countries (Boone 2009; Gall and Rahimi 2009). At this point, human rights networks in Kabul who had tried to mobilise attention

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<sup>71</sup> Interview # 19.

around the Shia law experienced a sudden explosion of interest. However given the difficulties they had encountered in accessing the process around the Shia law; obtaining the current version of it, finding out where in the parliamentary system it was and even engaging with the text, which was complicated and full of Arabic legal terminology, they had also started to think of the EAW law as a counterpoise to the Shia law. This line of reasoning was made possible by the fact that the EAW law, like many laws promulgated in the first decade of this century contained an article stating that ‘The provisions of this law, if contradicted with provisions of other laws, shall prevail’ ( article 43).

That the EAW law could prevail over the Shia law was evidently also an idea convenient to the executive and the Minister of Justice, who were keen to placate the constituencies who had promoted the Shia law, but at the same time, needed to address the anger of women’s rights activists and the donor community. Adding the EAW law instead of revising the Shia law meant that they would stay clear of accusations of giving in to Western pressure. Thus the logic presented at the gathering on the 19<sup>th</sup> of July, when the President had assembled a handful of female politicians and officials, was that the Shia law would be made invalid by the EAW law. One of those present, MP Shinkhai Karokheil later recounted how ‘they tried to bribe me with the EAW law’ <sup>72</sup> when she pointed out that the Shia law still contained problematic articles. Finding little support from the others present, she eventually endorsed the signing of both laws:

*When I was in the office of the president, he asked me if I was happy with the [shia]law. I said, we are very happy Mr President, but there are some articles that we would still like to change. . The Shia law had an article about orphans which seemed to permit child marriage, and I had suggested that to avoid this there should be a minimum age of marriage at 16, or at least 15. I also raised the article that linked maintenance with obedience; the right of the husband to not give food if the woman is not obedient. In Iran, this article proved difficult, because what exactly does it mean to be disobedient and who can prove it? So in the end they removed the article. We should do the same in Afghanistan. Also, polygamy should not be unconditional but by permission of the court.*

*I spoke about these things and the President said ok, I will send it back one more time to the [shia] ulama. [ Another woman present ] then said, no, its ok, don’t send it back, Mosheni will be upset. The Minister of Justice was saying ‘look, you have the EAW law.’ They were trying to bribe me with the EAW law. All of them were saying that the Shia law is OK. What could I do? And MOWA ( the Minister of Women’s Affairs) was there, but she did not say anything...<sup>73</sup>*

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<sup>72</sup> Interview # 79 27.03.12, Kabul

<sup>73</sup> Interview # 79, 27.03.12, Kabul



Whereas the Shia personal status law had already been ratified by parliament, the signing the EAW law was apparently based on article 79 of the Constitution, which allowed room for the president to adopt legislation during parliamentary recess in ‘emergency situations’ . Decrees signed by the president in this vein became laws upon signing but were to be submitted to parliament within thirty days of the first session of the National Assembly, who had the power to reject the laws decreed. Whether the EAW law qualified as an emergency situation was perhaps debatable. The main motivation of the president was perceived as the need to placate constituencies who had protested against the Shia law, and they in turn tended to see the signing of the EAW law to be more important than procedural issues.

The EAW law was then duly sent to the parliament for review and ratification. However, supporters of the law became increasingly worried that it would suffer significant revisions at the hands of conservative MPs that would dilute the value of the law or even turn it into an instrument of repression of women. There were suggestions to either withdraw it and keep it as a presidential decree for now, or to arrange a deal with the speaker to quickly introduce it to the plenary on a day when important conservative parliamentarians were absent. But the Women’s Affairs Commission in the Lower House, tasked with preparing the law for plenary debate instead sought to follow due process. It distributed the law to all the 18 parliamentary commissions, which would send representatives to the Joint Commission where the law would be debated before it was brought to general debate.

The parliamentary proceedings were also an opening for international legal professionals from the Criminal Law Reform Working Group to improve the EAW law in technical terms. This group was a joint Afghan- international working group, chaired by United Nation Office for Drugs and Crime (UNODC) and mandated to ensure consistency and coherence in the field of Afghan criminal law, where a number of standalone pieces of legislation were being introduced (see chapter 3). The group had already submitted their comments earlier, when *Taqnin* had forwarded them a draft. But their comments were mostly ignored and having in, their own words, ‘intercepted the law’ in its new version as it had been discussed at one of the regular gender coordination meetings for donors and aid agencies in Kabul, they became unsettled when discovering that the law still contained technical flaws.<sup>74</sup>

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<sup>74</sup> Interviews # 14 and # 15.

However, there was little will from the Afghan women activists and MPs who had supported the law from its inception to introduce revisions at this point. They argued that the chief purpose of the law was to make a political statement: to create awareness of the problem of violence and abuses against women and to make a stand against impunity for such acts. Introducing changes now, especially if they appeared to come from foreign quarters was too risky and could play into the hands of conservative opponents.

After the individual committees had submitted their proposed amendments, the law was discussed in joint commission meetings. Early on, a dividing line between the liberal and mostly female MPs and a smaller group of conservative male MPs, most of them with jihadi credentials was evident. Discussions crystallised around the question of beating, which some claimed was sanctioned, up to a point, by the Quran and therefore beyond discussion, the right of fathers to marry underage daughters, and conditions for polygamy. The atmosphere in the meetings became increasingly aggressive as a larger number of conservative MPs started to attend. In the end the meetings were suspended, after a verbal fight between a representative from the Ministry of Women's Affairs, brought by the women's parliamentary commission, and a male MP belonging to the jihadi group. Following an exchange of insults, these conservative MPs all walked out, declaring that an affront to one of them was an insult to them all. They refused to re-enter discussions before a personal apology was offered, and before their remaining demands were met. These demands centred on waiving the need for permission of the first wife for polygamous marriages, amending provisions which could be interpreted as limiting a husband's prerogative in terms of sexual access to his wife, an exemption for fathers regarding imprisonment in cases of underage marriage and the use of fines as punishments, which it was argued was un-Islamic<sup>75</sup>.

The clash in the joint commission gave ammunition to those who had suggested that the law was better left as a presidential decree, and that parliamentary process should be abandoned. They argued that the law risked being rejected in its totality, which meant that the presidential decree that have enacted the EVAW law would become null and void. Even if this did not happen, the revisions demanded by conservative MPs could result in a much weaker law than what had been secured through the presidential decree. Key female MPs in the Women's Affairs commission, who insisted the law should remain on parliament's agenda were accused

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<sup>75</sup> Interview #34

of using the parliamentary ratification process to put their stamp on the law and claim credit for delivering it, even when this could mean losing the ERAW law altogether.

Western embassies were becoming similarly frustrated over the parliamentary process. They had lobbied parliamentarian powerbrokers such as speaker Yunus Qanooni to get the law approved in parliament but to no avail, and several members of the diplomatic community in Kabul told me that it might perhaps be preferable to leave it as a presidential decree for the time being. By early 2010, the original supporters of the ERAW law had succeeded in removing it from the parliamentary agenda for now. At this point, supportive government officials, women's organisations and donors were already working to support the implementation of the law as it had been decreed, and reports of prosecutions based on the law were starting to trickle in.

This was, in brief, the trajectory of the ERAW law from its initial conception to its first phases of implementation. I now turn to the debates over its content, exploring which articles proved most contentious, the discursive parameters of the various forums where the law was discussed and what this tells about the intersections of gender and broader fields of power.

#### **IV. 'What is the basis for this law?' Discursive strategies and hierarchies**

##### *The text of the ERAW law*

The law which was enacted as a decree in July 2009 and served as the basis of the discussions in parliament consisted of 44 articles. It enumerated 22 forms of violence against women and provided punishments for them,<sup>76</sup> which ranged from fines, various lengths of imprisonment to the death penalty, the latter in cases where the victim was killed as a result of a sexual assault.

Of physical acts the ERAW law named rape, statutory rape, immolation and acid attacks, battery and violence leading to injury, disability or death as acts of violence against women. The punishments for these crimes were stipulated mostly by reiterating punishments already provided in the Penal Code. However, whereas the Penal Code had been unclear about whether rape was a crime distinguishable from adultery ( i.e. if one of the parties could be

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<sup>76</sup> See Annex 2 for a full list.

considered an innocent, and violated part) the EVAW law differentiated between rape and adultery by using the term *tajavoz-e jinsi* ( lit.: sexual violation) to refer to rape. Unlike *zina*, *tajavoz-e jinsi* was not a term originating in Islamic fiqh, being instead a newer term in Afghanistan used mainly in colloquial and media discourse to refer to rape.<sup>77</sup>

The EVAW law stated that if a person commits rape (*tajavoz-e jinsi*) with an adult woman, the offender ‘shall be sentenced to continued imprisonment in accordance with the provision of article 426 of the Penal Code, and if it results in the death of the victim, the perpetrator ‘shall be sentenced to the death penalty’<sup>78</sup> (article 17). It also stated that consensual sexual relations with an underage woman should be punished in the same way as rape. The law was therefore significant in making rape a crime distinguishable from adultery, and in making statutory rape ( sexual relations with a minor girl) a crime on par with rape.

As for punishments for causing injury and disability, the EVAW law merely reiterated specific articles in the Penal Code. In the view of some, simply referring to the Penal Code made parts of the EVAW law superfluous, since it was repeating punishments already provided in existing laws. However many civil society supporters of the EVAW law argued that it was nevertheless important to have a law that specifically stated that punishments would apply equally if the victim of violence was female. In existing legal practice this was often not the case, they argued, especially when a woman was abused by a family member.

In addition to the forms of physical violence already mentioned in the Penal Code, the EVAW law, more controversially, made a number of more minor offenses punishable. A person who beats a woman, causing no damages or injury, was to be imprisoned for no more than three months (article 23), harassment or persecution of women was to be punishment by a prison sentence of no less than three months (article 30), and the same punishment was provided for those guilty of verbal abuse, degradation and even cursing a woman ( article 29).

In line with the existing legal framework, forced marriage and *baad* (giving away women in marriage as compensation or as a conciliatory gesture) were deemed punishable offenses. Moreover, the EVAW law also criminalized underage marriage, selling a woman for the purpose of marriage and preventing a woman from marrying according to her choice. The law

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<sup>77</sup> In a meeting at Kabul University arranged in April 2010 to disseminate the EVAW law, several students at the faculty of sharia reportedly expressed the opinion that rape ( *tajavoz-e jinsi*) unlike *zina*, was not known to Islamic societies. Instead, rape was ‘brought’ to Afghanistan by ‘foreigners’ and to accept the difference between rape and ( consensual) *zina* would be to open up for changing the basic provisions of Islam. Interview #67

<sup>78</sup> It would have made more sense to refer to article 427. Article 426 merely states that if Hadd conditions are not fulfilled, should be punished according to this chapter.

also specified numerous other violations of the Civil Code and civil matters as punishable offenses. Polygamy in breach of the conditions set out in the 1977 Civil Code was to be punished by short term imprisonment of no less than three months. Depriving a woman of her inheritance or property, denial of an actual family or marital relationship to a woman for whatever purpose, prohibiting a woman from attending education or work or forcing her into isolation (for instance by denying her to see relatives) or to use narcotics were all to be punished with short prison sentences from one to six months. In addition, forced labour was to be punished with a six month imprisonment, whereas forcing a woman into prostitution or to commit to suicide was to be punished with prison for up to ten years.

#### *Debates prior to the final decree of the law*

Before the EVAW law appeared in its final version that was decreed in July 2009, it went through a number of changes. For instance, the draft handed over to the *Taqnin*<sup>79</sup> by civil society contained elaborate provisions on protective schemes such as protective rulings and restraining orders, and the possibility of prosecution of domestic violence without a complaint from the victim.

This draft also went much further in attempting to diminish the power of husbands over their wives. Article 53 made marital rape a crime, stating that ‘any intercourse with a wife without her consent is considered rape’. Polygamy was subject to the approval of the courts, who would seek the first wife’s approval and in any case approve the necessity of a second marriage only if the first wife was barren, insane or seriously ill. Violations would be punishable with up to five years in prison. The draft also stated that rape victims could not be detained or tried for *zina*, and that husbands accusing their wives of not having been virgins upon marriage,<sup>80</sup> could be punished for the *hudood* crime of *qafz* (slander, false accusation of *zina*.) The draft also abrogated article 398 of the Penal Code that made the killing of adulterous female relatives a minor crime.<sup>81</sup>

MOWA was uncomfortable with many of these provisions. In interviews staff recalled the civil society draft as being too far removed from Islamic law. The head of MOWA’s legal

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<sup>79</sup> Despite my best efforts I did not succeed in obtaining the first MOWA draft, which truncates the analysis in this section somewhat.

<sup>80</sup> This was a fairly common incident in Afghanistan, and was often grounded in the mistaken belief that all ‘virgin’ brides bleed on their wedding night. Such accusations could result in a new bride being sent home in shame to her parents and expose her to serious sanctions by her kin or family in law.

<sup>81</sup> Draft, the Law on Prevention of Violence against Women. Drafted by Afghan Womens Network, the Afghan Independent Human Rights Commission, Rights and Democracy, Contribution to Afghan women and Children, Ministry of Womens Affairs. On file with author. ( Dari)

department and one of the main initiators of the law stated she thought that the draft from civil society had been influenced by foreigners, and as a result, did not sufficiently incorporate sharia. This she felt, would reflect badly upon MOWA who had to be the organ officially submitting the law, and would put her Ministry in a potential conflict with the Supreme Court and the Ulama Council.

*Civil society made their own draft. They had included some input from foreigners and as a result the draft was not based on sharia (..) Seeing that there were no reference to sharia, I refused to present this draft as the MoWA draft (...) if we had accepted that, it could have created some issues for MoWA . What I suggested was that ok, as we had already sent the MoWA draft [to Taqin], I can help civil society to send a copy of civil society draft to Taqin as well, as result the final law will be even more enriched as material from this draft could also be used.’<sup>82</sup>*

In the end, the law that was finalized by *Taqin* in early 2009 was a much shorter and simplified version in which these more radical provisions from civil society were removed. It also had some technical shortcomings, which was what most international agencies focused on in their subsequent work with the law. Representatives of UNIFEM, UNAMA and UNODC protested what they argued was excessive and unenforceable criminalization, such as the inclusion of verbal degradation and cursing as crimes, and up to 20 years imprisonment for sexual harassment such as groping.<sup>83</sup> They also wanted the EAW law to abrogate existing provisions in the Penal Code rather than to merely refer to them. Moreover, since the law only focused on crimes against women, UN legal advisors argued that it actually created a new legal loophole in which sexual violence and assault against boys and men were effectively de-criminalized. They suggested that the law be renamed Law on Elimination of Violence against Women and Sexual Violence.<sup>84</sup> Additionally, they proposed to define rape as the ‘penetration of the vagina, anus or mouth with an object or body part, accompanied by violence, threat or deceit’<sup>85</sup>

These suggestions were mainly rejected by *the Taqin* and the Afghan women activists who had been promoting the law. The head of the *Taqin*, an experienced and generally respected official who had worked in the Ministry of Justice for decades argued that he had thought the

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<sup>82</sup> Interview # 70.

<sup>83</sup> Review of the EAW law by UNODC et al April 2009. On file with author.

<sup>84</sup> Explanatory Note on Proposed Amendments to Draft EAW Law. UNODC and UNAMA, 1<sup>st</sup> October 2009. On file with author.

<sup>85</sup> Review of EAW law by UNODC, April 2009. On file with author.

suggestions to amend the Penal Code was unrealistic and would complicate matters, when there was an imminent need for the EVAW law due to the suffering of Afghan women. He also thought that the suggestion to include a physical definition of rape as suggested by the UN legal staff would have been pushing the sensitivities of Afghan society too far. It would have been very embarrassing for the *Taqnin*, he argued, to present such suggestions to for instance the Supreme Court.<sup>86</sup> Moreover according to the view of the *Taqnin*, the EVAW law did not de-criminalize sexual violence against boys and men as this was already included in the Criminal Code and still valid.

The women's rights activists who discussed the international inputs also objected to many of the suggestions of the international experts. It was argued that to specifically repeal or amend other laws would not be accepted by the *Taqnin* nor the legislators and as a result the law would be withdrawn. It was better therefore to simply refer to the Penal Code, or to make separate provisions without specifically referring to other laws. Since the EVAW law contained an article which stated that it overrode all other laws, this was anyhow not a problem. The disagreements between the international legal experts and the Afghan officials and activists reflected a different understanding of the purpose of the law. Whereas the former emphasized the need for a technically sound law and one which was in line with other laws in terms of punishments, the latter were focused on the symbolic and political impact of the law. They argued that given the widespread discrimination against women in Afghanistan, a law which was solely for them and which provided harsh punishments would go some way in rebalancing their position in society and the legal system, even if it could not be implemented in full.<sup>87</sup> This line of argument also testified to a top down way of thinking about political change, a point to which I shall return later.

*'Good women do not need this law': Discussions in parliament*

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<sup>86</sup> Interview # 38

<sup>87</sup> TAG meeting 29.09 2009. Meeting notes on file with author.

Many of the people who had supported the EVAW law were worried that it would meet with considerable resistance in parliament, and as it turned out, their fears proved justified. In total, seven meetings were held in the joint commission debating the law.<sup>88</sup> The women's commission, tasked with chairing discussions and functioning as a secretariat for the revisions in parliament, had added their own revision to the law. These were minor and without consequences for the overall protection and rights afforded to women in the version which was decreed.<sup>89</sup> In addition the other commissions had reviewed the law and some – three in total – had submitted proposed amendments in writing. Of these, the amendments submitted by the Legislation (*Taqnin*) Commission of the parliament were the most comprehensive. Its representative in the joint discussions, Qazi Nazir Ahmed Hanafi, emerged as the leader of the conservative MPs who sought to block the law or amend it significantly.<sup>90</sup> The proposed amendments by the *Taqnin* commission, which would be the focal points of discussions in the joint commission, centred around reinstating in the EVAW law the prerogatives of husbands and fathers over their wives and daughters, justified by references to the Quran and Islamic jurisprudence. They included objections to a set minimum age for marriage, as it was argued that sharia law permits marriage of a girl when she has reached maturity (puberty), the right of the husband to demand that his wife do not leave the house without his permission, the right of husbands to beat wives under certain conditions as stipulated by sharia, the right of the father to marry his underage daughter without her consent and the rights of a husband to marry several wives provided he observes justice between them.<sup>91</sup> The amendments also took issue with the tendency in the law to impose prison sentences for actions such as cursing, or preventing a marriage, arguing that these matters should not be criminalized and that in general the law risked 'breaking up the family' by excessive use of imprisonment.

The first item of controversy which arose in the discussions was the question of beating (*lat- e kop*). Arguing that the Holy Quran prescribes beating as a last resort in cases where the wife disobeys her husband, several MPs claimed that article 5(7) which listed beating as a form of

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<sup>88</sup> I attended four of the seven sessions in the joint committee where the EVAW law was debated, whereas my research assistant also attended the last session. I also conducted interviews with the key participants in the debate as well parliamentary staff. My analysis of the parliamentary process is based on the Dari transcripts of the proceedings by my assistant, as well as press reports, interviews and the written amendments submitted by various commissions.

<sup>89</sup> Indeed, one of the members of the commissions confided that some of revisions were silly and simply put there so that they could be easily removed in order to show their adversaries that they were flexible.

<sup>90</sup> At the center of this group were ( apart from Qazi Nazir Ahmed Hanafi): Haji Niyaz Mohammad Amiry, Commission for telecommunication, Enginer Mohammad Asim, Commission for martyrs and disabled persons and Ataullah Ludin, Commission for justice and legal affairs.

<sup>91</sup> Amendments to Law on Elimination of Violence against Women. Legislation ( *Taqnin*) Commission of Parliament. Undated document. ( 2<sup>nd</sup> page missing). On file with author.



violence was therefore contrary to the Quran.<sup>92</sup> Although everyone present agreed that beating resulting in visible injury was not permissible, the head of the Legislative Commission and others contended that whether the article also prohibited what they saw as quranically prescribed beating was unclear and therefore the article was problematic. While some protested this literal reading of the Quran and argued that it was outdated, it was agreed that beating should be defined in such a way that it was clear it did not refer to the quranically prescribed disciplinary action. However at a later meeting, when the head of the Legislative commission was absent, the article was quickly approved in its original form.

Another controversy in the discussions was over the prerogative of fathers to marry their daughters against their will, an issue that resurfaced several times. With reference to the rights of guardianship in Hanafi fiqh, it was suggested firstly, that having a minimum age for marriage was against sharia, and secondly that in cases where girls were young and wanted to marry “inappropriately” (exemplified by a man of a lower class; do you want to marry your daughter to someone ‘smelly and dirty, someone who cleans toilets’ ?)<sup>93</sup> fathers were better placed to make decisions about their marriage and hence should be permitted to override their daughters choices and force them to marry someone more appropriate<sup>94</sup>. In the end it was agreed that ‘kind fathers’ would be exempted for punishments for underage marriage<sup>95</sup>.

The question of the extent to which polygamy should be regulated, and breaches of such regulations punished, was another matter where the women MPs met vehement opposition from the conservatives. In its written amendments, the Taqin commission had stated that ‘Marrying more than more wife is not violence, it is a sexual drive. Considering marrying more than one wife violence is contrary to the provisions of the Holy Quran.’<sup>96</sup> Female MPs argued that the conditions under which polygamy could be permitted were not stricter than what was already stated in the Civil Code, but conceded that two years imprisonment for breaches, a suggestion they had themselves made, was perhaps somewhat excessive. At the time that discussions in parliament broke down, there was still no agreement on the article on polygamy.

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<sup>92</sup> Second Joint commission meeting on the EVAW law, 03.11.2009

<sup>93</sup> Second Joint commission meeting on the EVAW law, 03.11.2009

<sup>94</sup> Second Joint commission meeting on the EVAW law, 03.11.2009

<sup>95</sup> Fifth Joint commission meeting on the EVAW law, 15.11.09.

<sup>96</sup> Amendments to Law on Elimination of Violence against Women. Legislation (Taqin) Commission of Parliament.

Article 17 on rape was contested by some of the conservative MPs who argued that the punishment was too strict. In particular, they protested that the law undermined a husband's right to intercourse with his wife, even if there was no explicit mention of rape within marriage in the law. The need to have stricter and better specified punishments for rape (including a ban on presidential pardons on rapes and other crimes in the law) was generally questioned by the conservative male MPs.

As the discussions proceeded, different female MPs had suggested some additional acts that should be added to the 22 forms of violence against women that the decreed law had listed. Two of these were readily accepted in the joint commission; the non-payment of maintenance (*nafaqa*, a wife's allowance normally to cover necessities such as food, clothes and medicine) and preventing a woman from exercising her political rights.<sup>97</sup> However, the last suggestion; honour killing (*qatl-e namus*), proved more controversial. In fact it was to be the issue where discussions broke down. The *Taqnin* had removed honour killing from an earlier draft, arguing that the crime of murder was already covered in the Penal Code. In parliament, there were no suggestions to amend article 398 of the Penal Code, which reduced punishment for the killing of female family members and their lovers when fining them *in flagrante delicto* to a maximum of two years imprisonment. Everyone was apparently in agreement that there was such a thing as 'real' or legitimate honour killing when a man discovered his wife or female relative in the act of adultery. Rather the problem arose when women were killed under circumstances where the perpetrators falsely or casually claimed that they had been caught in an adulterous act. The representatives of the *Taqnin* and the conservative male MPs contended that this kind of act simply amounted to murder, and was already covered in the Penal Code. To single it out as a special category of crime in the ERAW law was unprecedented in Afghan legislation and moreover, actually amounted to eroding women's legal protection. Female parliamentarians and representatives of MOWA argued that because these kinds of murders were so common, they should be included in the ERAW law so that the difference between legitimate and illegitimate honour killings could be explained and the latter punished appropriately. As one female MP stated:

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<sup>97</sup> Joint Session's Amendment Concerning Law on Elimination of Violence Against Women.( Undated) On file with author.

*'In so many cases, there was no (sexual) relation, there was no bed, but the woman was killed. This is a problem and we should not ignore it. What is the punishment for those who kill their innocent daughter?'*<sup>98</sup>

Eventually, in the last meeting, most participants agreed that in cases of honour killing the EAW law would state that if article 398 of the Penal Code was not applicable, ( i.e. when nobody was caught in the act of adultery) the perpetrator should be punished for the crime of murder. This was a remarkable concession from the women's side that men could take the law into their own hands when 'real' honour was at stake. But before they could proceed further, one of the conservative male MPs declared that he did not agree with the proposed solution. Why this was the case never became clear because the discussion suddenly escalated. A representative of MOWA quickly answered that his agreement did not matter, as the majority was in agreement. The MP, obviously angered, started insulting the MOWA representative, *'You are a prostitute! You have given money to get this position. Unlike you, I am a representative of the people!* To which she retorted: *You are the one who gave money to get your position! You gave banquets to get votes. I am a professor, a teacher. I do not care for illiterate men like you.*<sup>99</sup>

In a show of loyalty to a 'fellow mujahedin'<sup>100</sup> the conservative male MPs all got up and left the room, stating as they departed, that 'we shall see how you will be able to pass this law in the plenary.' Bewildered, the female MPs apologized to the MOWA representative, but asked her not attend any further meetings. These men are used to us, they stated, we know how to deal with them. They do not accept outsiders.

As described earlier, this turned out to be the end of the debate of the EAW law in parliament. The discussions had revealed particular discursive hierarchies and strategies. Occupying absolute authority in the discussion were references to the Quran and sharia. The female MPs made systematic attempts to ground their arguments in sharia, often emphasizing how they had sharia-based reasons for their claims. This was only partially successful, as none of them could speak Arabic or were thoroughly conversant in Islamic law, and the conservative MPs often outmanoeuvred them. In particular, the head of the Taqin Commission, often the only person present who was able to quote at length in Arabic and who claimed detailed knowledge of Hanafi fiqh was in unique position and frequently deferred to

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<sup>98</sup> Seventh Joint commission meeting on the EAW law. 19.11.2009

<sup>99</sup> Seventh Joint commission meeting on the EAW law. 19.11.2009

<sup>100</sup> As one of the other conservatives MPs later stated; MOWA was offending a fellow mujahed and we are not going to the debate anymore'. Interview #34.

because of this. The references to sharia effectively also undermined the authority of Shias. Many of the more liberal Islamic scholars in Kabul were Shia, often having studied in a more pluralistic scholarly environment in Iran, but their readings of fiqh were rejected by the Sunni MPs. As one of them said condescendingly when a Shia scholar was trying to make an argument about what Islamic law said about underage marriage, effectively rendering him irrelevant to the debate: *'My dear you are Jafari. I care only for Hanafi and Maliki fiqh'* <sup>101</sup>. This was a barely concealed remainder to the scholar, that as a Shia, his historical place in the religious hierarchy of Afghanistan was one of insignificance.

The 2004 Constitution was another joint reference point for the discussions, and none of the participants openly challenged it or any of its provisions. Afghan laws written after 2004 normally started with a reference to specific articles in the Constitution as reasons for its enactment, and the ERAW law presented to parliament referred to article 24, which stipulated the state's duty to uphold the liberty and dignity of human beings, and article 54, which obligated the state to protect the wellbeing of the family, the fundamental unit of society, and to eliminate traditions contrary to the provisions of Islam. Earlier, there had been suggestions to also refer to article 22, on gender equality, and article 7, on the state's obligation to abide by international treaties and conventions it had signed and the UN declaration on human rights. This was rejected by the head of the *Taqnin*, probably to avoid making the law more controversial than it already was to the conservatives in parliament. Article 22 was however, invoked by one of the conservative MPs who protested that the ERAW law's blanket ban on pardons for crimes covered by the ERAW law contradicted it, and infringed on the rights of men. <sup>102</sup>

The Civil Code proved less unassailable. When it seemed to contradict their interpretations of sharia the conservatives MPs declared that the Civil Code was of little importance to them. For instance, when many other participants in discussions protested that the Civil Code prohibited underage marriage, one of the conservative male MPs retorted that: *'The Civil Code is not the book of Allah. The father has the right to marry a girl whether she is young or old'* <sup>103</sup>. Some of the supporters of the ERAW law started to worry that, as a consequences of the parliamentary process, they might end up not only with a significantly revised version of the ERAW law, but also invalidating the Civil Code, which in many respects, provided

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<sup>101</sup> Second Joint commission meeting on the ERAW law, 03.11.2009

<sup>102</sup> Sixth Joint commission meeting on the ERAW law, 17.11.2009

<sup>103</sup> Fifth Joint commission meeting on the ERAW law, 15.11.2009

women with rights in relation to marriage. This they argued, was a sign that the very idea of putting the EVAW law through parliament had been a mistake from the outset. Of course, the Constitution potentially gave force to the argument that Islamic jurisprudence took priority over codified laws such as the Civil Code, since article 3 argued that no law could be in contradiction with Islam. But this argument was not invoked and on the other hand, the Penal Code was often defended by the conservative men. Some of them stated that the Penal Code also provided a sufficient framework for violence against women, and most of the provisions of the EVAW law, if not the law itself was unnecessary.

The women MPs were careful not to make references to human rights as a justification for the EVAW law. The accusation that the law was in essence a foreign invention; a ‘gift from the foreigners’ was never openly stated in the debates. Yet the possibility of launching such charges, and the risk of their possible ramifications, existed as an underlying threat, of which all parties were well aware. There was a sense amongst some of the civil society activists who attended the discussions that the conservative men were trying to tease out an explicit admission that the EVAW law was indeed ‘foreign’ in origin when repeatedly asking: what is the basis of this law? (*mabna-ye in qanon chi ast?*) If such a trap was laid, the women MPs successfully avoided it. Instead of referring to human rights or international conventions they appealed to the importance of nurturing the health of the family, to eradicate traditions contrary to Islam, and to give women the rights they were afforded according to sharia, in particular in relation to inheritance, choice of marriage partner and education. The conservative men, in turn, built many of their arguments on claims that the law would ‘destroy the basis of the family’ in particular by putting fathers and husbands in prison. Some of them also expressed the sentiment, although less openly, that the kinds of protection claims that the law recognized were illegitimate and suspect. Said one of the conservative male MPs during discussions in a semi-loud, disgruntled voice; *‘This law is anyway for the women of the street (a term implying prostitutes). Women living under the protection of Islam have no need for this law.’*<sup>104</sup> The statement reflected a commonly made assertion that women who left the house on their own were transgressors undeserving of protection or recognition. To feminist Afghans, both male and female, such sentiments were deeply offensive. As a female shelter manager stated in an interview;

*In Afghanistan, what kind of woman is regarded as deserving their male relatives’ protection and support? A woman who is obedient, loyal, always thinks about the*

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<sup>104</sup> Sixth Joint commission meeting on the EVAW law, 17.11.2009

*name of her male relatives, one who is silent and tolerates everything. Not one who goes to court,[ to complain] who goes public, who goes outside.*<sup>105</sup>

Some hoped that the EVAW law could go some way in challenging the notion that women who ventured into public places without male escorts were forfeiting any right to safety:

*It's important that the EVAW law states explicitly that the government has an obligation to protect women in public places. Because there are ideas in Afghan culture that good Afghan women are those who tolerate, who suffer, who stay at home and do not open their mouth. And that those who leave the house are not good women.*<sup>106</sup>

The strategies at work in the negotiations over the EVAW law had revealed a discursive field structured by Islamic terms. Justifying arguments by reference to the provisions of Islam were paramount. However, whereas for the reformers and supporters of the law, threats to the realisation of 'true Islam' were located in Afghanistan's internal conditions and a product of 'harmful' and ignorant traditions, (or occasionally: male power and patriarchy) for the conservatives the threat was cast in the form of foreign influence, which could undermine the otherwise strong Islamic foundations of Afghan society. The spectre of women's allegedly increased visibility, promiscuity, mobility and subversion of male authority (juxtaposed to earlier times when Afghan women sensibly preferred to stay at home under the protection of fathers and husbands) was presented as a novel and dangerous break with these foundations, an unnatural development which could be explained only by atheism and by foreign contamination.

In any case, it was not as if the conservative MPs 'won' the debate solely based on the merits of their argumentation. Underpinning the rhetoric of the conservative MPs were more subtle dynamics that made most of the female MPs unwilling to risk a full-on public confrontation and in the end, led the supporters of the EVAW law to choose a more discreet route of promoting the law and supporting its implementation. In order to fully appreciate the power relations at work, and to assess the outcome, however, I turn from substantive debates to the

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<sup>105</sup> Interview # 39

<sup>106</sup> Interview # 6. In the next chapter, I explore in greater detail how 'leaving the house' constituted a testing ground for clashing gender orders

processes through which the EVAW law was conceived, promoted, contested and ( in parts) implemented.

## V. Political ambiguity and discreet lobbying

The process of drafting and advocating for the EVAW law revealed the constraints under which Afghan women activists worked, and the strategies they adopted as a result. MOWA, who had existed in an increasingly tense relationship with the assertive and often more radical ‘civil society activists’, mainly staff in internationally funded aid organizations, but also a small group of government legal officials, had been unwilling to share the draft of the EVAW law with them until it was handed over to the Ministry of Justice. This upset many of the civil society activists, and confirmed their opinion of MOWA as a non-transparent institution that would rather produce substandard work than to consult more broadly. More dramatic however, was the sudden presentation of a third draft, by the then head of the Women’s Commission in parliament, Qadria Yazanpardast. As stated above, Mrs Yazanpardast herself claimed that she had been unaware of the existence of the two drafts already produced and merely wanted to present Afghan women with a ‘gift’ on ( international ) women’s day, an occasion widely marked amongst urban groups in the country.<sup>107</sup> However others contested this, saying that her draft carried exactly the same title as the other drafts and was clearly an attempt to improve a meagre record of achievements to date by appropriating the whole idea.

Divisions also appeared once the EVAW law reached parliament. At that point, Qadria Yazanpardast, a Tajik MP and self-declared supporter of the *Jihad* had been displaced as the leader of the Women’s Commission in an acrimonious leadership contest. In her place were two younger, more savvy female MPs, Fauzia Koofi and Sabrina Saqeb, who played the lead role in attempting to steer the law through parliament and defend it against conservative assaults. Like Yazarpardast before them, they belonged to the opposition group in parliament. However, they were perceived as being personally beholden to the powerful parliamentary speaker Yunoos Qanooni and did not succeed in gaining other female or progressive MPs trust. The latter questioned the formers’ personal commitment to women’s rights and accused them of pushing through with a counterproductive process in order to be able to claim the EVAW law as their own legacy.

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<sup>107</sup> Interview # 19.

The competition, at times bitter,<sup>108</sup> that existed between the various actors that in one way or another sought to promote the EVAW law reflected a broader set of dynamics in Afghan politics; personalization and individual competition. Of this, more will be said shortly, but here I like would suggest that the international aid given to women's activism was operating in such a way as to reinforce such dynamics. Jad (2004; 2007) points to the contradictions between NGOs and social movements, and the way in which 'the NGO structure creates actors with parallel power based on their recognition at the international level, and easy access to important national and international figures'(2004: 39). Her analysis can be extended to any entity whose existence is largely dependent on international funding. International aid, as a bureaucratic practice, rewards time limited- achievements that can be formulated as the realization of objectives, targets and benchmarks. Continued existence is dependent on the ability to 'deliver' concrete 'outputs' presentable in technocratic templates rather than the mobilization of large constituencies and coalitions. To some extent, this could explain the appearance of the three competing drafts and the seeming prioritization of personal credit and aggrandizement over quality. For instance, MOWA, who since its establishment had been dependent on international funding, and had been under fire from both donors and civil society for a lack of tangible accomplishments were, understandably keen to protect the EVAW law as its own achievement and to see it realized sooner rather than later. This was presumably an important reason why, rather than going through a long process of carefully revising the law and anchoring it more broadly within the 'women's movement', MOWA was anxious to see the law ratified and implemented without delay. The third draft submitted by the head of the women's commission in parliament was interpreted, similarly, as a strategy to demonstrate individual achievements at the cost of quality and collective gains.

The subsequent promotion of the EVAW law, once a single draft had been consolidated, took place through a small constellation of women activists and diplomats. Rather than seeking broader alliances, in 'civil society' or in parliament, the law was 'fast tracked' through presidential decree, in a manner that reflected a small, externally dependent and top-down women's movement more generally. When made aware of the technical weaknesses in the law, and how it contradicted existing laws, the civil society activists and MOWA protested

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<sup>108</sup> I was given a taste of the intensity of this competition when, in the middle of one of the meetings in the joint committee, I was asked to come outside by one of the female MPs, who I had interviewed a few weeks earlier. She told me that she needed to inform me about the personal life of some of the other women in the room. It was their illicit affairs with married men she said, which caused them to push for polygamy to be made more difficult by the EVAW law. This would lead their lovers to divorce their first wives instead of taking them as co-wives. The circulation of these kinds of rumors about the personal lives of female politicians were common.



that such issues were of secondary importance. The most important objective was to get the law approved and to start implementing it, thus sending a signal that impunity for violence against women could not be tolerated.

This approach must be situated within the larger practices of law making by decree, where the exercise of devising, and promoting, a law in relative isolation and as a stand-alone piece of legislation was by no means particular to Afghan actors. As Hartmann and Klonowiecka-Milart (2011) point out, ( see chapter 2) lawmaking by decree had become a standard practice amongst international consultants and aid workers who were often even more oriented towards the technocratic ( and political) demands of demonstrable outputs. In the case of the ERAW law, this was particularly evident in the period leading up to its presidential ratification in July 2009. After the fiasco of the Shia personal status law, which had embarrassed all NATO governments vis-à-vis their home constituencies by making it obvious that claims to liberate Afghan women could not be sustained, US diplomats in particular took a strong interest in the ERAW law.<sup>109</sup> They thought that the ERAW law, which at that point was being reviewed in the Ministry of Justice, could to some extent neutralize the Shia law. This was also what many Afghan MPs, human rights officials and indeed the Minister of Justice himself argued. As is evident from embassy cables, the US embassy had repeatedly discussed the law with the Minister of Justice Sarwar Danesh. A cable from May 2009 read:

*'[ The political consular ] told Danesh the Embassy had studied the ERAW bill and found it to be a strong piece of legislation. We were disappointed it was not moving through the Administration as quickly as we expected. We informed Danesh that [US Ambassador-at-Large for Global Women's Issues ] Verveer planned to visit Kabul in late June. We would welcome cabinet approval prior to her arrival (...) Danesh pledged to work on getting the bill through Cabinet approval prior to the end of June.'* (Embassy of the United States Kabul 2009)

Therefore, although the US government did not want to take public credit for the ERAW law, as this would certainly have harmed its status by giving ammunition to those who sought to frame the law as a 'foreign 'gift'– it also participated (and reinforced) in the kind of law reform where isolated, symbolic and sometimes hollow achievements obtained through informal pressure and negotiations was pursued over more anchored, long term gains requiring broader coalitions.

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<sup>109</sup> See embassy cables: Embassy of the United States Kabul, A. (2009). Elimination of Violence Against Women law: MOJ draft complete; Cable May 6 2009, Embassy of the United States Kabul, A. (2009). Justice Minister Danesh, Slow movement on shia law amendments, faster on eliminating violence against women draft bill, May 27, 2009.

There were however, other important reasons why such strategies prevailed. Chief amongst these was the dynamics in parliament, described by Larson, (2009) as a ‘culture of political ambiguity’. This political ambiguity or ‘a reluctance to disclose political allegiances’ ( ibid: 12), in turn hindered the formation of blocs and the articulation of platforms, and made the development of a pro-women alliance which could secure legislation such as the ERAW law in parliament difficult. According to Larson, it had several causes. Political parties and issue-based politics never had a strong position in Afghanistan. The electoral system after 2001 also discouraged the formation of political parties through the obscure Single Non-Transferable Vote (SNTV) system, which recognized only individuals and not political parties (Reynolds 2006). President Karzai, and many in his circle who had put forward this system argued that political parties and their divisive ways were to blame for the violence that had plagued Afghanistan since the 1978 coup (Humayoon 2010), a particular historical narrative that incidentally favoured executive power. Larson also argues that the importance of patronage politics served to discourage open and committed political allegiances, since such mechanisms depend on the possibility of shifting loyalties.

However, the most important reason for this political ambiguity, Larson suggests, was the lack of security. As she points out, Afghanistan had little history of political pluralism and tolerance of opposition (2009:13) and it should therefore be unsurprising that there was widespread caution about expressing political positions and allegiances. The members of the former jihadi *tanzims* – who also dominated the parliament (Ruttig 2006) had a comparative advantage in such a climate. Their leaders were widely believed to be able to exert intimidation and coercion. Even if such assumptions were often based on rumours, they nonetheless served to keep opponents in check.<sup>110</sup>

This sense of insecurity and intimidation was an often unstated yet obvious factor in the calculations and conduct of the Afghan promoters of the ERAW law. Many women MPs and activists were conscious of the risk of attracting a label of being ‘anti-mujahedin’ or being

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<sup>110</sup> I experienced these dynamics for myself when going to the house of the head of the Legislative commission to interview him about the law and his views of it. At the end of the interview, the conversation turned to my own marital status and probing questions about my religious identity. As I was cast as a lapsed Muslim and unfit wife who had left behind my husband (of Pakistani origin) to pursue research in a foreign country, I suddenly found myself uncomfortably trying to pull down my long coat as to conceal my legs completely. I recalled rumors that my informant during his time as a judge for the mujahedin had ordered a number of executions based on religious non-adherence and I suddenly felt uneasy that it was getting dark and we were in the outskirts of Kabul. Although my sense of unease was passing and completely unfounded, it provided me with some insight into of the powers of intimidation facing local women activists.

seen to openly challenge their authority. Some of the activists had suggested that in order to get the EVAW law through parliament it would be best to introduce it furtively and quickly on a day when the main jihadi and mullah MPs were not present, possibly through some kind of prior deal with the speaker, which pressure from the foreign embassies could bring about. They were reluctant to meet the conservative MPs in open debate and felt that it was better to quickly and discreetly get a parliamentary ratification without drawing too much attention to the law or themselves. The fear of arousing jihadi wrath also manifested itself in the debates in the joint commission. Many of the women advocates of the law were careful not to appear too provocative or assertive, and it seems safe to assume that it was such concerns which provided their adversaries with much of their power, rather than the strength of their arguments. Without taking this underlying factor into account, the dynamics in parliament (or the suggestion to avoid parliament altogether) could not be fully appreciated.

#### *Enforcement of the EVAW law*

After the EVAW law was signed into decree on July 2009 it appeared in an extraordinary issue of the official gazette of the Ministry of Justice, dated 1<sup>st</sup> of August, 2009. This gazette featured all new laws and its editions were distributed to justice institutions across the country (much like the old kingly decrees). The EVAW law quickly became the focus of the parts of the international aid apparatus orientated towards women and legal reform. The Italian government, through the international organization the International Development Law Organization (IDLO) funded the establishment of a special unit at the Attorney General's Office in Kabul, to be emulated in other provinces. The unit, which was called the Special Unit on Violence against Women ("the VAW unit") was to specifically investigate and prosecute cases of violence against women and had more than half a dozen of dedicated prosecutors.<sup>111</sup> In addition, training sessions on the law for judges, prosecutors and other government officials were organized, booklets were produced and disseminated and various conferences and meetings were organized where the law was discussed and promoted.

Despite this, the impact of the law was uneven and difficult to ascertain. In the province of Herat, where the chief provincial prosecutor Maria Bashir was a woman known for being both capable and pro- women's rights, prosecutions based on the EVAW law had started already in late 2009, at the time when the AGO office in Herat stated that they had received the law. Prosecutors reported that most of the complaints filed under the law were related to beating,

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<sup>111</sup> At the time the unit was launched in March 2010 through an official ceremony it still had no official existence as it had not been incorporated into the *Taskhil* of the AGO- the government approved structure

and that several convictions had been secured.<sup>112</sup> That Herat was a pioneer province in enforcing the EVAW law was not surprising, given the existence of a well-educated middle class and a comparatively consolidated formal justice system who often adjudicated in a relatively pro-woman fashion.<sup>113</sup> Reports about prosecutions from other provinces, in particular from relatively liberal provinces such as Kabul and Balkh, also started to appear in the course of 2010. However, there was also confusion. Some judges in Kabul stated that they were not applying the law as they had heard it was under review in parliament and therefore they were unsure of its status. During 2011, as the Supreme Court started to distribute the law more systematically to courts around the country, and as various agencies such as the International Development Law Organization (IDLO), US contractor Justice Sector Support Program (JSSP) and the UN conducted more training sessions, the law seemed to gain some level of traction.

International donors were keenly tracing prosecutions and conviction numbers. Statistics from the special prosecution unit obtained by the US embassy in May 2011 indicated that there had been 286 cases of prosecutions so far under the law. Yet of these, only 37 percent were still ongoing, whereas the rest of the charges had been dropped or the case referred to civil courts. So far, there had been no convictions. In September 2011, UNAMA, the UN mission to Afghanistan, stated that prosecutors in 28 provinces registered complaints under the law in the past year, but that less than one quarter of the cases reached the courts (UNAMA 2011). As of mid-October 2011, the VAW Unit in Kabul had initiated 596 cases, but they had led to no more than five convictions (SIGAR 2011: 98). In a report dedicated to the implementation of the EVAW law, launched in November 2011, UNAMA discussed the low level of convictions secured by this unit, and found that most of the cases were referred to mediation instead. UNAMA concluded that assessment of the special unit should be undertaken.<sup>114</sup> ( p. 14) The numbers suggested that although the EVAW law was becoming better known, it still struggled to make a definitive impact. Herat province stood out as an exception — out of the

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<sup>112</sup> Interviews #45 and #46.

<sup>113</sup> Closer relations with Iran where women tend to make much more use of the courts, who – compared to Afghan courts —often adjudicate in their favour was often cited as another reason for why the official justice system in Herat was more pro-women.

<sup>114</sup> The UNAMA report on the EVAW law found that between March 2010 and 2011, the first year of full implementation, out of an estimated baseline of 2,299 known incidents that the AIHCR had registered as crimes under the EVAW law, there had been 594 cases where prosecutors had opened a case, 155 files of indictments and the primary courts had used the EVAW law to adjudicate in 101 cases.

155 indictments filed under the law during the year of 1389 ( March 2010-March 2011) 68 were in Herat.

## **VI. Conclusions**

To what extent did the EVAW law challenge established gender orders and domains of governance? Did it entail a transformation whereby women were constituted as citizens under state protection and where family authority over women was substituted for, or at least modified by, that of the state? As this chapter has sought to demonstrate, there were no straightforward answers to these questions. The EVAW law as it was decreed did represent a considerable potential reorganization of both women's subject position and the reach of state realms versus that of kinship. Had the decree been enforced in full by the courts, the result would have been a significant increase in the power of the government in overseeing and regulating sexual and gender relations, to underwrite women's protection and equal rights in marriage, and to punish transgressions. As we have seen, as the law was reviewed in parliament, attempts were made to amend it in a direction that would safeguard fathers' and husbands' prerogatives over women— by allowing fathers to marry off minor daughters, and by establishing husbands' rights to beating and polygamy. Women were also afforded their part of the 'patriarchal bargain' (Kandiyoti 1988); it was to be a crime for husbands not to provide maintenance for their wives.

But regardless of the final the text of the law, an equally important point is this: Unlike not too dissimilar legislation introduced by kings like Abdur Rahman or Amanullah ( see chapter 3) , the EVAW law did not in any way represent the attempts of a modernizing ruler to curtail the power of kinship groups. Evident in the attempts to promote and implement the law were instead a constellation of foreign diplomats, activists and pro-women justice officials, their efforts underwritten by the funds and infrastructure of aid agencies. Whilst this constellation worked, in parts, through Afghan state institutions this did not mean that there was a single, unambiguous, sovereign national power ruling over a single 'public domain' ( in the manner of the ideal typical modernist nation state ). Both the status of the law and its implementation was partial and tenuous. The legal status of the law was uncertain. It had neither been approved nor rejected by the parliament and it appeared to be in contradiction to other laws. Its presidential endorsement was offered up as a bargain – the Minister of Justice and the

president had effectively offered each constituency its own law— a progressive ERAW law for Afghan feminists and their allies, and the Shia personal status law— in many cases in direct contradiction to the ERAW law – to the Shia clergy. Some of the supporters of the law appeared to endorse this – rather than engaging with the entire legal framework (and their political adversaries) – they were content to be granted a law of their own.

In many respects, the ERAW law appears as a textbook case of Saskia Sassen’s ‘neither global nor national’ assemblage. As she states, ‘these assemblages cut across the binary of the national versus global. They continue to inhabit national institutional and territorial settings but are no longer part of the national as historically constructed’ (2008: 61). The promotion and implementation of the ERAW law in many ways was a case of the global working through the national. The law was drafted and promulgated through national institutions, submitted by the Ministry of Women’s Affairs to the Ministry of Justice, and revised there before eventually being decreed by the President. Similarly, the implementation of the law happened through Afghan justice institutions- the prosecutors and the courts. At the same time, as this chapter has demonstrated, these processes were to a large externally driven. The ERAW law, adopted partially due to Western pressure, and enforced partially due to strong international involvement in monitoring and funding, in many ways brought Afghan women into a global protection order, where the guarantors were international organisations such as the UN. But if there was a global ERAW law assemblage working through national institutions it should also be said that be this assemblage was in no sense a totalising, unidirectional force. Global templates intersected with local dynamics, dynamics that amounted to more than simply the formal procedures of national institutions seamlessly facilitating a global order. The processes traced in this chapter show that rather than being two contradictory forces, where the advent of one would reduce the other, personalised politics and external reform attempts often worked together. Executive power was strengthened as Western diplomats preferred to work with the cabinet and the president— rather than the cumbersome and unpredictable parliament— when they wanted something done. But this also gave President Karzai an opportunity to strengthen his power base through the granting of favours in an exchange of offerings and loyalty. The ERAW law was a ‘gift’ to two of his constituencies- women activists and Western supporters. At the same time he also bestowed other gifts which in some ways cancelled out the ERAW law — the Shia law. Similarly, the emphasis placed on output and fundraising by the ‘Ngo-ization of women’s activism also fed into personalised and patron-client politics.

What clearly lost out in the ERAW law assemblage was the possibilities for more robust traditions of democratic participation and collective mobilisation. Supporters of the ERAW law decided that the price for parliamentary ratification of the law was too high. As we have seen, there were several aspects to this price. The conservative in parliament demanded significant concessions, which had they been incorporated, would reinstate some of fathers' and husbands' authority over daughters and wives. But there was also a more general sense of uncertainty among women activists about the prospect of confronting a political field that was stacked against them. They were well aware of sentiments amongst certain male MPs and beyond that the ERAW law represented an illegitimate protection claim; good and respectable women could rely on male relatives to shelter them from outside predations and for the same relatives to not subject them to violence. By implication it was immoral women who were in need of the ERAW law. I believe that the category of 'immoral women' was frequently also subtly stretched to include all Afghan women who in one way or the other questioned male authority. This kind of gendered denunciation, infused with associations of religious and national betrayal constituted a key political weapon in the hands of the jihadis and added to women's sense of vulnerability when operating in public debate and national politics. Instead of risking this hazardous terrain the supporters of the law decided to fall back on more discreet strategies and on the support they had amongst sympathetic government officials and Western donors.

By virtue of it operating through transnational funding and pressure, the ERAW law assemblage was in many ways part of a technocratic global VAW discourse ( see the introduction of the thesis) where violence against ( Afghan ) women was rendered a global concern subject to the expert interventions of transnational actors and institutions. At the same time, there was more to the composition and workings of the ERAW law assemblage than just another manifestation of a transnational governmental practice, underlining the point made in chapter 1 that governmental power is not a 'totalizing logic' but a situated practice necessarily infused with other forms of politics (Li 2007). As we have seen, local politics shaped the framing and promotion of the ERAW law in particular ways, enabling and reinforcing personalised politics.

The international aid interventions in Afghanistan were also imbricated with broader geopolitical relations. The aid agencies involved in drafting, funding and monitoring the ERAW law had proliferated on the back of a military invasion that had produced much starker international hierarchies than what was immediately visible through looking at the

practices of organisations such as the UN and IDLO in isolation. In the processes examined in the next chapter; the controversies around women's shelters, the geopolitical dimension of external guarantees are brought into much sharper relief.



## Chapter 5: Between sanctuary and surveillance: The women's shelters

*As long as there is violence against women...when a girl has no place at her father's house which should have been the place of love and mercy, when she has no place at her husband's house which should have been a place of dignity, when she is not treated according to the rights and dignity that Islam has given to a woman, then she must have a place where she can take refuge and her life can be saved, and shelters are these places.*

Huma Sultani, former staff at AIHRC, Kankash, Tolo TV, 19th February 2011

*The girls running away from their houses and seeking refuge in shelters are of the kind who seeks to realize immoral and unhealthy desires, desires contrary to our society and against our culture. These are girls who would like to be free so that they can do anything they want.*

Qazi Ahmed Nazir Hanafi, MP, Kankash, Tolo TV, 19th February 2011

### I. Introduction

This chapter focuses on negotiations and contestations over the space, both literally and metaphorically, for women to leave their families in cases of abuse. After 2001 more than a dozen women's shelters were established in Afghanistan, providing a living space for women and girls who could not, or for security reasons did not want to, live with their families. As it was highly uncommon, if not altogether unheard of, for women to set up accommodation on their own outside of their family or marital dwellings, the shelters were radical establishments by their very existence. The shelters unsettled government practices and popular discourses that cast women running away from their homes as transgressors and even criminals. In contrast to such constructions, the existence of shelters problematized the domestic domain as a potential site of abuse, from which women had a legitimate right to seek protection. What

unfolded was a series of negotiations over the conditions under which women could legitimately ‘escape’ from home and take up residence in a shelter. At stake were the interests that kinship groups and society at large could claim on the movements, chastity and propriety of women – and how such interests could be secured through surveillance mechanisms over women’s mobility and conduct.

At the same time, the controversies over the shelters revealed deeper fault lines. The women’s shelters operated through donor funding and donations from abroad. Drawing upon international networks and resources they were, to some extent, constituted as transnational institutions. This enabled the dozen or so shelters in the country to act fairly autonomously of the Afghan government on many counts, and to challenge or circumvent attempts by Afghan government officials to regulate, supervise or co-opt them. The international leverage and resources that the shelters were able to mobilize when pitted against the government was a source of frustration, suspicion and resentment. To Afghan officials, and to the conservative media and politicians rallying against the shelters, the fact that the shelters were funded and supported by ‘foreigners’ meant that the women residing in them were out of control in three ways; beyond family control, and outside government and ‘national’ supervision. In other words, the shelters were a challenge to the institution of the family, to the government’s authority over the foreign-funded civil society, and to Afghanistan as a sovereign, Muslim country. Such anxieties formed the backdrop of the government’s eventual attempt to “nationalize” the shelters; to place them under government administration. But as detailed below, this initiative was successfully pushed back by the NGOs running the shelters and their local and international allies.

The first part of this chapter provides a closer examination of how particular constructions of gender – and the worldviews underpinning these constructions – made women’s shelters so contentious. I argue that government practices and popular discourses that render women who “run away” as transgressors are essentially a public sanctioning of families’ claim over female sexuality and reproductive capacities. Pointing to how shelters represented a challenge to family sovereignty over women, I suggest that the attempts to place the shelters under government regulation spoke to the anxieties over possible ramifications of “unsupervised” women; namely declining corporate family and male influence over women as a whole.

I then turn to other dimensions of the shelter controversy. By way of detailing a few key events, I illustrate how contestations over the shelters became enmeshed in broader issues of

competing models of service provision, of popular discontent with NGOs and of attempts to insulate women from alleged foreign intrusion. I also argue that the success of the shelters' efforts to thwart government attempts to nationalize them was indicative of a consolidation of effective transnational alliances around women's rights in Afghanistan. But these alliances generated certain power hierarchies. The shelter's ascendancy had been achieved at the cost of employing old orientalist tropes linking Western rule to "saving" local women. In turn, their victory over the Afghan government reinforced dependence on a fickle Western presence.

## II. The "run away woman" as a transgressor

When human rights workers visited Afghan prisons in the months after the 2001 invasion, they found that the majority of female detainees were held for reasons related to 'moral crimes':

In June 2002, there were about 300 women confined in Kabul jail(..) the majority were (..) 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. It appears that these women have no access to lawyers, have no information on their rights, if any, and are generally left in jail until their respective relatives intervene....(Lau 2003: not paginated )

Being incarnated for having run away was a gender-specific predicament. Only women could "escape from the house" (*farar az manzel*); men simply went out, left or in some cases, abandoned their families. Broadly, constructions of running away as a female-specific crime or a subversive act hinge upon a gendered order where women are considered legal minors. They are wards of household heads, husbands and families, who have claims over them and to whose supervision and protection they should be returned. Women's outings to public places (anywhere outside the house; the street, the bazaar, to the houses of relatives) are thus subject to permission (*ijaze*) by elders, husbands or male relatives ( see chapter 3).

The kind of gender order which renders unaccompanied women in public places potential runaways who the authorities were duty-bound to arrest is not only hierarchical (in the sense that women were subordinated to men), but also segregated. Outside space is male space,

where men socialize, and engage in business, trade and politics as a matter of fact, whereas women remain trespassers. As interlopers in public spaces, women must limit their forays to what is strictly necessary and with a clear purpose, and preferably accompanied by others. Unaccompanied women are suspect and potentially threatening to social order. The head of a juvenile detention centre in Herat patiently explained this to me as a response to my somewhat disingenuous question as to whether there were any boys in the centre who had been arrested for running away. Boys, he said, could not be said to “run away”:

*When a boy leaves and come back after two or three days, no-one in the family consider that to be a problem. If a boy is walking alone on the street in the night nobody stops him to ask from him what his business is or where he is going. The police notice a girl or woman walking alone on the street in the night with no obvious aim, but they do not notice boys in the same way. According to our traditional beliefs if a girl is gone for three-four days it will be a big shame for her family. Its difficult for them to accept her back.<sup>115</sup>*

The underlying principle linking a woman’s tenuous presence in the public sphere to her subordinate and dependent status within the family was the stake others, namely her family and male guardians, held in her sexuality and her reproductive capacities (see chapter 3). In Afghanistan, doubts over a woman’s virginity or fidelity could often be generated whenever her chaste behaviour and nature could not be positively verified by reputable witnesses. Women who had spent unaccompanied time outside of family domains generally fell into a category of questionable virtue. From a systemic perspective of public morality and “social order”, that is, the overall upholding of a gender order which recognized kinship claims on women, single women “at large” in public spaces and living beyond family surveillance became unsettling. If tolerated, the entire system of social regulation of female sexuality might eventually collapse. In turn, women running away from their homes effectively challenged the claims that families and husbands made over them. Their act of defiance was moreover a double one – against their families’ claim and a whole system that recognized family authority over women. The fact that female “escaping” was such a subversive act provides one of the contexts within which the shelter controversy must be understood. Shelters called into questions the very claims families have over daughters and wives and the ability of families to monitor female family members. They enabled women to leave their

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<sup>115</sup> Interview # 47.

families and reside in a space where, in the imagination of many Afghans, they were completely at liberty to indulge in immorality:

*[A shelters] ..is a place where youngsters want to go to fulfil their immoral desires, those which they cannot do at home due to the monitoring and control of their parents.*<sup>116</sup>

The shelters therefore encountered and sometimes collided with government practices which usually upheld family claims over women. Families, judges and the police often asserted that the widespread practice of detaining runaway women was in accordance with Islam. But in fact, the exact ways in which governments in Muslim countries have enforced family authority over women “runaways” have differed. Mir Hosseini points out that while all the classical fiqh schools constructed a marital relation in which women were placed under the protection and domination of the husband; in return for *nafaqa* ( maintenance; food, shelter and clothing) a wife was obliged to *tamkin* ( obedience), the exact content and meaning of obedience differed. (Mir Hosseini 2010, see also Sonbol 1998). For some, obedience was primarily understood as sexual obedience and related to a husband’s right to his wife’s body. If the wife required the husband’s permission to leave the house, it was because of his rights of sexual access to her, to go out without his permission would be to infringe upon his rights to this access (ibid.) and she would be declared *nushuz* (disobdient). Others interpreted the duty to obedience more broadly, not only in sexual matters.

In legal practice, the exact conditions under which women were ‘housebound’ have been shown to vary, and even more so, the degree to which they were enforced by institutions of law. Sonbol examines, in the context of Egypt, what she points out is a modern practice, the “house of obedience” ( *bayt al-ta'a* ) a precept under which a judge could order a women to be sent back, by police if necessary, to her husband if her petition for divorce was rejected in court. Sonbol argues that legal practice prior to the codification of personal law was more flexible. Women were able to negotiate their own marriage contracts with clauses that could give them significant mobility, ability to get divorce and so on (Sonbol 2003). As a general rule, a judge would not order, and even less force, a woman to live with a husband if she refused to. She claims that the promulgation of personal laws in Egypt during the late 19<sup>th</sup> century, whilst ostensibly a mere codification of sharia, actually incorporated patriarchal gender relations from Europe to greatly enhance the husband’s power over his wife compared

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<sup>116</sup> Qazi Ahmed Nazir Hanafi, MP, Kankash, Tolo TV, 19th February 2011

to existing legal practice. The new laws in effect gave the husband absolute right over his wife (Sonbol 1998, see also Tucker 2008; Cuno 2009) and the *bayt al-ta'a* was an official enforcement mechanism to that end. The Egyptian modern law also served as a model for other codified personal laws across the Middle East, where the *bayt al-ta'a* until recently was enforced by the courts and police (Shehada 2009).

The Egyptian example serves to illustrate that there is no singular Islamic or fiqh position on women's ability to leave the home, and certainly no uniformity in types of government enforcement. Thus, Afghanistan, cannot merely by virtue of being a Muslim country be assumed to have a specific gender order that criminalizes women who go out. Historical research on gender boundaries in Afghanistan is generally scarce. In the absence of source material, and a tendency to write the history of changing policies concerning how these boundaries were drawn as a perpetual and undifferentiated tug of war between kinship and tribal power and a centralizing, but ultimately, impotent Kabul, (Ahmed-Ghosh 2003; Zulfacar 2006; Burki 2011) it is difficult to assess how recent policies and social practices compare historically. Yet scholarship on other Muslim-majority countries would suggest that Afghan women in certain periods and contexts may also have been at greater liberty to move around independently, to petition for divorce or dissolve a marriage, or to establish independent dwellings than what was the case during the first decade of the 21<sup>st</sup> century, when the 'woman question' became politicized in new ways.

What seems beyond doubt is that compared to previous government policies, the Taliban government's infamous orders that all women could only leave their house in the company of a *mahram* and completely veiled was a radical new imposition. In its rigidity Taliban gender policies effectively usurped kinship power in the sense that the question of permission or non-permission for women to leave the house was no longer left to the discretion of families or husbands, but subject to the uniform dictates of the government, who also took it upon itself to punish women directly (Cole, 2008). As Malikyar reports from the Taliban's 1996 takeover of Kabul:

..the new rulers of Kabul assigned a number of militia men to the streets, markets and mosques, bestowing them with a mandate to carry out on-the-spot punishments on violators. On 2 October, two women, spotted in full veil on a Kabul sidewalk, were beaten with a car radio antenna. When asked for the charges, the militia men stated that the women did not have a good reason for leaving their homes (Malikyar 1997: 396-397).

The Taliban's attempts to impose their singular gender regime was part of their larger project of imagining and enforcing a political vision counter-posed to 'the West', and to the urban corruption and violent chaos proceeded over by the PDPA and the Rabbani-led mujahedin government respectively. It was also an assertion of a rural, Pashtun power over urban, non-Pashtun groups, forcing the latter to adapt practices more associated with the former ( Cole, 2008).

After 2001 government policies on women's mobility and public presence became much less restrictive, and also more fluid and open ended. On the one hand, the very presence of the "runaway woman" in official discourses signified that the government was accommodating family sovereign claims over women. Yet the outcome of individual cases was never certain. Although women and girls found on their own outside of their home areas or in the company of unrelated men were routinely arrested and prosecuted, their subsequent fates varied. In some cases authorities doubtlessly intervened mainly to ensure the women's welfare. However, most of the time women appearing to be travelling on their own were deemed to be suspicious. They were treated as offenders of *zina* or the more diffuse offense of having "run away" (although, as will be elaborated on shortly, the formal legal system recognizes no such category of crime). Once detained they were normally subjected to hymen examinations ("virginity tests") and unmarried women who failed this test were often found guilty of adultery by default. Indeed, in certain areas of the country, virginity tests of any woman who came into contact with the law was routine, and even women detained for other reasons altogether could get an additional charge of adultery if they were unmarried and failed the virginity test.<sup>117</sup>

Families also made complaints to the police when a woman had gone missing. They could call upon the government to return a woman to them against her will, or at the very least, to detain her (although in many cases families also tried to keep the authorities out and settle matters in their own way). At the same time, women would often be referred to shelters if the police found that there were no suspicions of adultery and they had legitimate reasons to flee. Courts would also, on occasion, acquit runaway women on adultery charges, although in other cases they found women guilty of the "intention to commit zina" based on the fact that they had left their home.

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<sup>117</sup> Interview # 48.

Even if inconsistently applied, the casting of women leaving the house as problematic had a strong bearing on those who experienced family abuse and violence, and in turn, the space that the shelters could operate within. Women who were leaving their houses in order to escape abuse or unwanted marriages were treading a difficult path where their actions were deemed to be suspect by default. In turn, shelters were accused of housing immoral women and their very right to existence was being called into question. They faced the wrath of families, who threatened, cajoled and made quiet inquires to get female relatives back. Local leaders and journalist also rallied against the shelters, accusing them of encouraging women to leave their husbands, for housing adulteresses, and for being fronts for brothels.

### **III. The Supreme Court directive on “running away”**

The significant number of incarcerations of women based on charges of “running away” had gradually become the focus of both Afghan women’s rights workers and the gender and legal reform aid agencies.<sup>118</sup> They protested that running away was not an offense according to Afghan criminal law; only adultery was criminalized. Elaborate training programmes were developed to inform legal officials, who frequently had sentenced women to jail for having run away, of the actual limits of the law. In response, many judges – if they engaged with such appeals to legality at all – referred to article 130 of the Constitution, which stated that Hanafi jurisprudence could be applied when no other laws did. Alternatively, many changed the charge of running away to ‘running away with the intention to commit zina’.

Eventually the International Development Law Organization (IDLO), an intergovernmental organization active in the field of women’s rights and the legal system, solicited the opinion of the Supreme Court on the matter. In response the Court issued a directive in August

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<sup>118</sup> The exact number of women detained or sentenced for ‘running away’ in Afghanistan has proved difficult to establish. Authorities at all level were often reluctant to disclose statistics, and prosecution and court or jail records did not use consistent categories, so what was recorded as ‘running away’ (*farar az manzel*) in one instance could be recorded as *zina* or ‘running away with the intention of *zina*’ in another. ( Similarly, rape and *zina* was generally not differentiated, although sometimes the term forced *zina* was used ). However, reports estimated the total number of women and girls incarcerated for ‘moral crimes’ ( *zina*, running away and attempted *zina* ) was around 350 country wide in 2011, somewhat more than half of the total female prison population, which was 600. (Farmer 2011). Every year, the President would also pardon a considerable number of women sentenced for moral crimes, so that the number of female prisoners detained for such crimes at any given time tended to remain at the same level. While this was not a large number, human rights workers argued that it served as a powerful deterrent for women who wanted to leave abusive family situations ( Personal communication, Heather Barr, March 2012) .



2010.<sup>119</sup> The directive stated that in order to determine ‘a run-away case’, as a first step the following questions should be taken into consideration:

- 1- Is the runaway a female? Is the runaway single or married?
- 2- What was the cause and motive for running away?
- 3- Has the runaway escaped to the house of relatives or strangers?

The Supreme Court further listed three scenarios, differentiated on the basis of whether there had been violence or not, and whether the woman had run away to a relative or ‘legal intimate’. It concluded that if a woman had experienced violence and was running away to a relative or legal intimate, this would not be considered a crime, ‘because it is the right of every individual to stay safe from cruelty or torture’. Moreover, if a married woman ran away, similarly to a relative or legal intimate, but for no ‘religious or legal reason’ this was deemed not to be a criminal issue but a civil one, and only the husband could launch a complaint against the wife. However, if a woman, married or single, ran away to a stranger’s house rather than to relatives or to state authorities, even if she ran away due to family violence, this act was considered to be prohibited and prosecutable for punishment since, according to the Court’s reasoning, it could result in crimes such as adultery or prostitution. The directive here referred to a principle of Islamic jurisprudence, the *Prohibition of Means*: ‘Any action that leads to what is prohibited is prohibited. That is why running away [to a stranger] is prohibited and is punishable.’

The Supreme Court directive illustrated that what was under discussion was not only the validity of the grounds for running away, but also the *mode* of doing so. Effectively, what the directive rendered problematic was the prospect of women outside family or government surveillance. This hinged on a strong connection being made between women’s mobility and freedom and their sexual availability. Women were rendered incapable of being entrusted with their own virtue – and therefore, outside of the supervision of designated guardians they were deemed suspicious. Although men could also be arrested for *zina*, it was not considered problematic per se for them to travel or live on their own, which it was for women.

By the time the Supreme Court directive was issued, such considerations had already informed the practices of several shelters. However, the exact arrangements worked out at the

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<sup>119</sup> Approval # 572 dated 24 Aug, 2010 of High Council of Supreme Court. English Translation by UNODC, Kabul. On file with author.

local level between shelters and law enforcement authorities, and MOWA and AIHCR– the two formal referral institutions to the shelters – differed, as became in clear in my interviews with various shelter staff. In theory, women were not supposed to go directly the shelters, (whose location should not be disclosed) but to MOWA, AIHRC or the police, who would then refer them to the shelters, if deemed appropriate. One shelter manager explained to me that a lot of women in her province were unable to come to the shelters, because the police would accuse them of adultery and refer them for prosecution instead. If a woman, having fled her house, failed to go directly to the authorities or to a close relative’s house she was liable to be prosecuted for *zina*. The response of this particular shelter manager in Herat was to attempt to systematically inform local women of what she perceived to be the parameters set by the law. Using the example of someone breaking a speed limit and then claiming ignorance, she contended that it was the duty of women themselves to know how the law worked. Women seeking to leave their families because of abuse had to make sure they would come directly to the authorities. They should never spend a single night at more distant relative’s house or anywhere else– which would create a gap unaccounted for in between the time she left her family and when she reached a public authority.

According to the manager of the referral centre in the Eastern city of Jalalabad, a kind of short term shelter from which women would be sent onto to shelters in the capital, the police and the centre had an understanding that the former would subject all women to hymen examinations before they were allowed to go to the centre. Unmarried women were only allowed into the shelter if they were found to have intact hymens, those who were not were arrested and prosecuted for adultery. This was a way of ensuring the legitimacy of the shelter within the local community and it was also in accordance with the protocol they had signed with MOWA the shelter manager said.<sup>120</sup> However, staff members at DOWA in Jalalabad reported that in cases where they suspected sexual relations between a young eloping couple, they would try to contact the family directly and arrange for a *nikah* (Islamic wedding ceremony) and to keep the couple out of the reach of the police and their medical examinations.

Other shelters, notably in Kabul, were more defiant and stated that they would admit women to stay even if they had not been referred but had come directly to them, and regardless of their prior history.<sup>121</sup> This stance fed into anxieties over shelters as some kind moral void into

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<sup>120</sup> Interview #64.

<sup>121</sup> Interview #121.

which women could escape and behave without regard for social norms and propriety, articulated clearly in the second quote at the beginning of this chapter. It is allegations such as these, widely circulating in Afghan media, that formed one of the backdrops for the sudden announcement by the Minister of Women's Affairs that the government would take over the administration of the shelters.

#### **IV. 'What have been run by NGOs now belongs to the government.' Attempts to "nationalize" the shelters:**

On the 15<sup>th</sup> of February 2011 the Minister of Women's Affairs, Dr Husn Banu Ghazanfar held a press conference where she stated that the women's shelters would henceforth be run by MOWA. In a series of rather nebulous formulations, the Minister made several accusations against the shelters and laid out the reasons why MOWA was better placed to run them. The background to the new regulation, she stated, was a ministerial commission which had reviewed the shelters and had uncovered 'serious problems and many violations'. When asked for further clarifications the Minister mentioned lack of order and discipline, chaos, no follow-up of the women's legal cases, and disregard for the individual shelters protocols that MOWA had crafted.

The question of who would run the shelters was also presented as a matter of national sovereignty and self-reliance. At the Kabul conference, Minister Ghazanfar said, referring to a donor conference held in 2010, the Afghan government had asked the international community to channel money through the government. Therefore, 'what have been run by NGOs now belongs to the government. We are ready to be responsible and should stand on our own feet'. Moreover, the minister stated that the budgets of individual shelters were completely out of proportion with their activities, implying that some of them were involved in corrupt practices. Questioning why the shelters needed to spend a total of USD 11 million on a total of 210 residents, she declared that MOWA would be able to run these shelters much more cost effectively. Furthermore, the rumours that were discrediting the shelters would find less fertile ground if they came under government control. The content of these rumours were not specified at the press conference, but they generally consisted of allegations that shelters were immoral places harbouring prostitution, extramarital sex and drug abuse and that they were encouraging women to leave their families and husbands. When probed, the Minister

stated that she had no evidence that such things had taken place in the shelters but added that she did not have any evidence to the contrary either. In any case, she said, the takeover by MOWA would stop such rumours as the ministry's staff would be present in the shelters and constantly report back to the ministry.

The press conference was the culmination of long running tensions over the shelters between the government, conservative politicians, the international donor community and the NGOs running the shelters. The statements made by the Minister illustrated the many dimensions to this conflict. Indeed, the press conference served as microcosm of these. One axis of tension concerned the conditions under which women could leave their families. Although, on paper, those admitted to shelters would arrive through referral from the government or the AIHRC some shelters admitted women directly. Such open door policies undermined the possibility of screening out those women who were not deemed worthy or in need of protection. To the conservatives, they opened up the possibility for any woman to leave her family, to engage in adultery on the way, and take up residence in a place where no questions were asked. But some women's rights activists and shelter managers were also uneasy with the open door policy that a few of the shelters had adopted. They regarded it as an obstacle to a broader acceptance of the shelters by Afghan society. They thought that having common admittance procedures would provide some reassurance that those residing in shelters had legitimate protection needs and therefore the shelters were providing a necessary and legitimate service. But faced with the unilateral declaration by MOWA that the shelters would be nationalized, all of them proceeded to present a united front in the confrontations that ensued.

As the press conference indicated, MOWA's decision to take over the shelters was the product of other considerations as well. Minister Ghazanfar had spoken about how Afghanistan, as a sovereign country should no longer tolerate the fact that large portions of the development funds to Afghanistan were being channelled through NGOs. Whether the government or the NGOs should run the shelters was made a litmus test of whether the country was recognized as an equal nation state amongst peers and by its Western allies. The scepticism towards NGOs was also rooted in preferences for welfare and social services to be more tightly regulated and implemented by the state, and in a general antagonism towards the aid industry in general and "Westernized" NGO female personnel in particular. To elaborate on these additional dynamics I detail below a few events centring on the shelters, which had unfolded prior to the MOWA press conference.

## V. 'What Happens if We Leave Afghanistan': Bibi Aisha

When visiting one of the shelters in Kabul, – run by the organization Women for Afghan Women (WAW) – in the early summer of 2010 I was told that one of its residents was a young girl from the province of Uruzgan whose nose and ears had been cut off by her husband. A few months later the world would come to know that woman as Bibi Aisha. On the cover of Time Magazine, her mutilated face was made to serve as an illustration of 'What Happens if We Leave Afghanistan,' as the caption read.<sup>122</sup> The Time front page revived debates about the war in Afghanistan in the West, and about the appropriation of Afghan women's suffering as an argument for supporting the NATO operation. The Time cover was rightly criticized for speculatively constructing an irrefutable and uncomplicated relationship between saviours and victims, between Western withdrawal and the mutilation of Afghan women. By making the fate of women like Aisha directly dependent on the West's willingness to commit to continued armed operations and depriving the maiming of the girl of all context save this direct relationship, the magazine front page appeared as a textbook example of how

discourses of salvation- of saving Muslim women from Muslim patriarchal law- are sutured on to a specific civilising mission, one that involves *giving* women their democratic/secular rights (Siddiqi 2011:77).

In fact, the linkages of Aisha's husband with the Taliban proved vague at best and as it was widely pointed out, the presence of NATO countries had not prevented the violence against her. In Afghanistan the publicity surrounding the Time cover also fed into the ongoing controversy over the shelters. In certain circles, the magazine cover was viewed as a national humiliation. The case came to represent the impotence of the Afghan people vis-à-vis the international community. In an interview, Amina Afzali, the Minister of Labour, Social Affairs Martyrs and the Disabled reported to have been upset with the shelters' high profile in discussing abuse, referring in particular in the case of Aisha Bibi, now brought to the US for facial reconstruction, which had humiliated Afghanistan in the eyes of the world. Other countries, if subject to similar scrutiny would also have been shown to have such extreme cases she contended (Rubin 2011).

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<sup>122</sup> Time Magazine 09.08. 2010

The photograph and the publicity surrounding it also reinforced the scepticism towards WAW held by some of the other shelters. WAW was an organization founded by expatriate Afghans in New York in 2001. It proved extremely apt at fund raising, lobbying and marketing and espoused an uncompromising stance on women's rights. However, amongst other shelters and their supporters there was a measure of frustration over WAW. Questions had long been raised about WAW's policy of allowing media into its premises, and of facilitating interviews with journalists that disclosed the identity and background of its residents. Other shelters tended to limit media access to the shelters, on the ground that its residents were both deeply traumatized and in need of anonymity for their protection. The WAW shelter's location was an open secret in Kabul and women were allowed to go and visit their families. It also appeared to be paying little heed to MOWA's protocol which called for regular reporting and admission only through referral. It was claimed that WAW's lenient ways were undermining the shelters' standing as a whole and making them all more vulnerable to both populist backlash and government antagonism. With the Bibi Aisha cover these sentiments resurfaced. It might be easy for the WAW to spirit women away to the US, but the solution was not to send all women into exile, said one women activist. She worried about the ramifications that the publicity of the case had for the shelters' local legitimacy and acceptance.<sup>123</sup>

Like the later controversy over the government regulations for the shelters, the Bibi Aisha case had highlighted the transnational alliances that many Afghan women's advocates had established with Western activists. These alliances sometimes entailed a framework of action that made Afghan women's rights dependent on Western government action, a framework where the main target of advocacy was NATO governments and their population who had to ensure their politicians would do the right thing and not 'abandon' Afghanistan. What was needed was for NATO governments to stand up to Karzai and his warlords, to mercilessly defeat the Taliban and to keep supporting and funding Afghan women. Such a reductive framework made Afghanistan a homogenous field where sources of women's oppression were interchangeable: local patriarchies, Taliban, warlordism and Afghan culture were collapsed into a singular threat that only the West could defeat. This framework could not accommodate the trade-offs, negotiations and compromises that other local feminists sometimes deemed to be necessary, lest they be forever dependent on the West. Neither could it allow for a scrutiny of new relations of domination enacted by NATO military operations, such as raids, detainments, killings and a host of other actions carried out with almost complete impunity by

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<sup>123</sup> Personal communication with former shelter manager.

Western military forces. While the fallacies of ‘rhetorics of rescue’ and the alignments they produce have been amply analysed elsewhere, (Abu-Lughod 2002; Butler 2009) my point here is to show how such discourses appeared in contestations about concrete issues in Afghanistan.

For instance, WAW espoused a clear political position that called for a continued NATO presence and was uncompromising towards any strategy other than military defeat of the Taliban. After the announcement of the so-called surge and the increase in US troops in 2009, WAW issued a press release where it declared its support for the policy.<sup>124</sup> With reference to how the picture if Bibi Aisha had laid out the bleak future of Afghan women should Western troops leave Afghanistan, its director, Manizha Naderi said;

‘That is exactly what will happen. People need to see this and know what the cost will be to abandon this country.’ (Nordland 2010)

As the controversy over the shelter regulations moved into international arenas (see below) a similar logic was employed. Calling on the US and other governments to honour their pledges to Afghan women was made synonymous with a resolute stand against the Taliban, and thus the defence of women’s right was made dependent upon continued NATO military presence.

## **VI. Nasto Naderi’s campaign against the shelters**

Fanning the backlash against the shelters was the relentless anti-shelter campaign of Nasto Naderi, a journalist at the *Jamiat*<sup>125</sup>-affiliated Noorin TV. Known as a formerly reputable journalist who had inexplicably turned into a populist reporter with questionable journalistic standards, Naderi had for a long time been running what he claimed to be an investigative exposé of the shelters. His TV show *My Homeland (Sarzamin-e man)* was widely watched. One of his early programmes on the shelters had shown footage of an orphanage falsely presented by the show as a shelter. The programme showed several young women gathered in a room in the purported shelter, and Naderi had implied that they were forced into prostitution by international aid workers.

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<sup>124</sup> Afghan Women, Security and United States Strategy, 01.12.2009 WAW Press release

<sup>125</sup> *Jamiat-e Islami* (Society of Islam) was one of the mujahedin parties during the jihad years and was registered as a political party after 2001. It was led by Burhanuddin Rabbani until his assassination in September 2011

A later programme, aired on the evening of the same day as the MOWA press conference, featured a story about a girl who had fled her family after her father had killed her lover. Naderi claimed that this ‘very beautiful’ girl had caused the death of 12 people, and was therefore a criminal who did not deserve to be in a shelter. In reality she had run away after her affair with the young boy was discovered, and had led her father to kill her boyfriend when he refused to marry her, in turn leading to a cycle of revenge killings claiming the lives of 12 people. In his feature about this story Naderi stated his intention to go to the shelter the next day, TV crew in tow, to confront them live on TV about housing such a girl and to ‘show the faces of these activists.’<sup>126</sup> Horrified, the manager of the shelter – run by an Afghan NGO – mobilized her supporters and networks. They eventually reached through to the US embassy, and as later narrated to me by Naderi, ‘then Karl Eikenberry [the US ambassador] called the Minister of Interior and the Minister of Interior told the chief of my television channel: don't make a programme about this woman again.’<sup>127</sup> Unsurprisingly, Naderi alleged this constituted an undue interference into media freedom, and only served to reinforce his claims that the shelters were ultimately a foreign product. Mixed into these spurious and speculative broadcasts was Naderi’s rhetoric, drawing upon the now established vocabulary of the *jihadis*’ anti-feminism, ( see chapter 4) which painted women’s increased mobility as a threat to national independence and Islam, and thus the historical achievements of the mujahedin. To the *Wall Street Journal*, Naderi declared that the shelters were an abomination to the establishment of the Islamic Republic of Afghanistan, a feat that the former mujahedin commanders had sacrificed so much to establish:

The shelters are not acceptable for our people who have fought 30 years to put the word Islam in front of Afghanistan. We live in an Islamic country...But some NGOs come and want to make another way for our country (Abi-Habib 2010).

Yet interspersed with all of this were elements of more substantial, if ultimately deeply flawed, criticism of the aid industry. In military combatant trousers, tight T-shirts and a bandana, Naderi and his similarly clad colleagues had the air of urban vigilante militias, out to protect ordinary Afghans from the predations and injustices of NGO women and their international collaborators. Echoing the charges made by the Minister of Women’s Affairs, Naderi argued that his anti-shelter campaign had been motivated by what he called an “NGO

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<sup>126</sup> Interview # 144

<sup>127</sup> Interview # 141



mafia” who were exploiting women for their own gain. He claimed that while all women in Afghanistan needed help, those running the shelters were merely using the image of the down-trodden Afghan women to raise money for themselves and to further their careers. How was it possible, Naderi said, that so much money could be spent with so few results? And how could the shelters justify spending 10.000 USD a month on a building that housed 5-6 women when other women were starving in the streets outside?<sup>128</sup> This and many of his other statements were not substantiated by evidence, but they undoubtedly carried some local resonance. Naderi also played on popular perceptions, reinforced by the Bibi Aisha case, that the shelters pitted women against their families and encouraged them to leave their homes, and even their country, upon a whim:

*They say you should leave your family, go to the to shelter and if you have a big problem you can just go to the US or Europe [for asylum ]. No NGOs is saying how the women can live with their families.*<sup>129</sup>

The statement ignored the fact that some of the shelters were involved in or supported ‘reconciliation’ between the families and their residents. Upon written promises that the families would not harm them, women would go back to their marital or natal homes, sometimes with tragic consequences (see chapter 7).

*Sarzamin-e Man’s* tirades against the shelters gave force to government and popular scepticism about them. A rising backlash against the shelters could clearly be observed in the parliamentary questioning of the new presidential nominee for Minister of Women’s Affairs, Palwasha Hassan, during early 2010. She was asked by one of the MPs, the head of the Women’s Department during the mujahedin government in the early 1990s, about her work with shelters. Since it was known that shelters were not a good place for Afghan girls and their families would not accept them back, the MP said, could the nominee explain herself to the Parliament?

Following Naderi’s cue, other TV channels started to air programmes about the shelters, often with personal attacks on the shelter managers and others, such as officials at the AIHRC, who had supported them. As the public outcry escalated, eventually, the Ulama council declared that the shelters had to be closed down, and upon the orders of the Vice President Marshal Fahim, MOWA was tasked with drafting new regulations which would bring the shelters under government control.

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<sup>128</sup> Interview #141

<sup>129</sup> Interview #141

## VII. Victory for the shelters

At some point in early 2011, a draft of these government regulations on shelters was presented to the Criminal Law Reform Working Group (see chapter 4) in the *Taqnin*, who was tasked with reviewing all laws related to criminal matters. Members of the Working Group alerted the shelters and activists, who found the draft deeply unsettling.<sup>130</sup> In particular, they objected to article 4 which stated that all shelters would henceforth be run by MOWA:

The Ministry of Women's Affairs shall be responsible for the administration of the protection centers. To administrate protection centers established by non-governmental organizations ( NGOs) the Ministry of Women's Affairs shall appoint 2 of its female employees as the director and deputy director to the protection center <sup>131</sup>

The draft also provided for an 'admission committee' to consist of representatives from relevant ministries, the Supreme Court and the AIHRC, who would supervise the running of the shelters, and refuse admission when appropriate. Furthermore, this committee would refer one category of those who could be admitted to the shelters;<sup>132</sup> namely 'women and girls who had been compelled to leave their house' for a forensic medical examination (taken to mean a virginity test). Article 8 stated that women and girls suspected of or accused of crimes would not be allowed into the shelters, and that residents were not allowed to leave the compound of the shelters.

These provisions clearly reflected the ongoing tension between protection needs versus the dangers of adultery and anxieties over 'unsupervised' women. Representatives of MOWA argued that the regulations were an attempt to secure legitimacy for the shelters and that a framework of government monitoring would provide reassurances (or valid proof) that women living in shelters were still chaste. The head of the legal department of MOWA explained:

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<sup>130</sup> Interviews # 16, #140 and # 144.

<sup>131</sup> Draft Regulation on Women's Protection Centers. On file with author

<sup>132</sup> Article 6 listed 5 categories of person who could be admitted. 1. Those women who have been compelled to leave their house. 2. Those women whose safety and human rights are exposed to danger. 3. Those girls whose mothers are in prison and who have no safe place to live. 4. Those women and girls who are released from prison and have no place to live, until they are handed over to their families or relatives. 5. Afghan women and girls who have been expelled from a foreign country and have no place to live within this country.

*Most men in this country are very conservative when it comes to a woman issue. It is never acceptable to those men who regard themselves as Muslims that their wives go and live in a shelter, when nobody knows what is going on in those places.*<sup>133</sup>

In short, the draft regulations laid out an official monitoring regime to prevent women's shelters becoming black holes where women's conduct and chastity could not be controlled and therefore not verified. They were also designed to create some local anchoring for incidents related to individual admission. Many shelters were under strong pressure to return women to families who attempted to claim them back. In one case unfolding during the development of the regulations, even a current minister was said to be applying pressure to retrieve a female relative of his from a shelter.<sup>134</sup> MOWA had claimed that an admission committee at the local level would give some authority to shelter decisions to admit girls and make it more difficult for families to challenge them.

The shelters protested against these and other elements of the regulations. They argued that government run shelters and an admission commission would actually be less well placed to withstand pressure from relatives, and that MOWA was not institutionally equipped to run the shelters. On the 2nd of February, WAW issued a strongly worded press release which warned that the proposed bill

would give the Ministry of Women's Affairs (MoWA) shelters in Afghanistan, all of which are run by non-government organizations (NGOs). These shelters are funded by international foundations and governments, not one of which has authorized any branch of the Afghan government to assume control of them(..).

The issue of shelters was also linked to the prospective negotiations with the Taliban:

WAW has taken a strong stance against negotiating with the Taliban. All past and recent history—the accumulation of vicious threats and violent acts against women, their stance against education for girls—is undeniable evidence that regardless of what they sign during negotiations, the Taliban will not honor women's rights once they gain control of a territory. WAW sees MoWA's audacious move as an attempt to appease the Taliban and ultra-conservative members of the government.

Finally the press release positioned NGOs as a last defense against a Taliban-leaning government:

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<sup>133</sup> Interview # 70.

<sup>134</sup> Interview #134.

NGOs have made progress on women's human rights in Afghanistan. In fact NGOs are the main defense against the obliteration of those rights in the country. .

Meanwhile, discussions took place through the Criminal Law Reform Working Group, where shelters and women activists were invited to provide their input. Despite this process apparently making progress,<sup>135</sup> alarming press articles about the regulations, detailing their content and quoting the concerns of the NGO's running the shelters proliferated in the international media.<sup>136</sup> The proposed regulations were also placed in the context of larger effort of the government to attract the Taliban to a peace deal. Nader Nadery, from the AIHRC stated that the government was restricting women's rights for this purpose:

[the government officials] are sending these signals [ to the Taliban ] that: 'look we have made these changes and look we are putting some restrictions, we are taking on board some of your concerns. It is a very very wrong policy. If you give more, in advance of any talks, you feed into the confidence of the Taliban, so that they will come and dictate their terms. They will not accept the constitution; they will not accept the gains of the past nine or 10 years. (Farmer 2011)

A few days later, the fronts hardened further with the press conference given by the Minister of Women's Affairs, who presented the regulations in their original form, without the revisions arrived at in the CLRWG. Although some people argued that the aggressive tone of the minister was designed to placate the conservatives,<sup>137</sup> some of the shelters understood her intention as that of whipping up anti-shelters sentiments in order to assert MOWA's control over them. They thought her accusations of corruption in the shelters was irresponsible, especially since she had been unclear about what she meant by it; corruption in Dari can mean both moral corruption (*fesad-e aklahi*, an euphemism for illicit sexual behaviour) and financial corruption (*fesad-e idari*, lit. 'office corruption'). The term 'moral corruption' was employed by Nasto Naderi when he declared his intention to visit one of the shelters and expose its activities live on TV.<sup>138</sup>

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<sup>135</sup> A version of the regulations with all of the concerns of shelters incorporated was developed by the CLRWG , dated 09.02.2011. On file with author.

<sup>136</sup> Entitled Afghan Proposal Would Clamp Down on Women's Shelters, an article about the regulations appeared in New York Times on 10<sup>th</sup> of February 2011.

<sup>137</sup> Interview #134

<sup>138</sup> Interview # 140, #134 and #16.

The mistrust apparent between MOWA and the shelters was also a clash between different generations of service provision. In Afghanistan, older repertoires of a socialist welfare state dating from the PDPA era were also discernible in the period after 2001. Many of the urban middle class who were staffing government positions had been PDPA bureaucrats and amongst the populations as a whole, the notion that the state should be a provider and benefactor, running welfare programs and intervening in markets held a certain resonance. These notions ran counter to the dominant paradigm for service provisions in the international aid community that financed the shelters, and the ways in which the shelters were currently run, through NGOs. This paradigm entailed relying on non-state actors to whom services was sub-contracted. Doubtlessly, there was also a certain amount of resentment and even jealousy amongst MOWA staff towards the Afghan “NGO women” running the shelters. Many of them had made a name for themselves on the circuit of international conferences about Afghanistan and were the recipients of international awards and scholarships. Their proficiency in English and in delivering the project proposals and reports required by the aid industry and mastering its vocabulary stood in stark contrast to the somewhat hapless state of much of MOWA, where the kind of skills valued by the international aid industry were much less in evidence.

In the weeks that followed, international mobilizations against the regulations gathered pace. At the forefront was Women for Afghan Women, who set up an online petition demanding that President Karzai withdraw any law ‘that wrests control of Afghanistan's women's shelters from the local Afghan NGOs that have founded and run them and transfers it to the Ministry of Women's Affairs (MoWA)’. The Afghan Women’s Network, an umbrella network for women’s organizations wrote an passionate open letter ( in English), entitled *To The Gatekeepers of Women’s Honor*, where it denounced the Afghan government for having overseen a non-transparent and incompetent process of attempting to take over the shelters, and for hypocritically accusing shelters and their supporters of undermining national honour by exposing human rights abuses against women, when it was itself damaging Afghanistan’s international reputation by turning a blind eye to the abuses committed against women, often by its own officials. Letters were sent to Western embassies in Kabul from citizens in their own countries and three US senators wrote to the Afghan president, reminding him of the sacrifices the United States had made for Afghanistan and calling the shelters regulation a ‘great mistake.’ The U.S. Assistant Secretary of State followed with a more cautiously

worded statement expressing concern over the regulation and encouraging the government to allow the NGOs to operate the shelters independently.

As the international storm intensified, President Karzai eventually backed down. Claiming misunderstandings, he said the regulations were to be redrafted along the lines of the suggestions already put forward in the Criminal Law Reform Working Group, allowing the NGOs to continue to run the shelters and incorporating their protests about admission committees and other issues. In contrast to earlier controversies, such as those over the Shia Personal Status Law (see chapter 4), the Afghan women activists were unanimous in their approval of the end result.<sup>139</sup> There was also a feeling of confidence that they wielded influence and could shape government policy in a positive way. Said one Afghan human rights official: 'They [the government] are listening to us women activists because they know that we are able to make trouble and noise otherwise.'<sup>140</sup> In the international diplomatic community in Kabul, some did not consider it to be such a clear-cut victory. A US diplomat later stated that the Afghan women activists had been too quick to mobilize international opinion and should have tried to reach an agreement with the Afghan government first:

*In this case, the women activists went straight to the New York Times first... they rely too much on international media. This kind of strategy is going to do some long term damage... Afghan women's rights activists should focus more on negotiations, less on uncompromising public statements.<sup>141</sup>*

Judging from the timing of the press statements and international newspaper coverage, which appeared in parallel to the discussion over the shelter regulations in the Criminal Law Reform Working Group, the path of negotiation had not been exhausted prior to the shelters and their allies mobilizing international outrage.<sup>142</sup> Eventually, the storm of international reaction made the Afghan government backtrack on their declaration to nationalize the shelters. However, as the controversy over the shelters was brought into transnational spheres, the parameters of the contestations changed somewhat. More than anything, the attempts to take over the shelters was presented as a deliberate strategy to appease the Taliban, as a first step on a slippery slope

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<sup>139</sup> Interview # 140, #134 and #16.

<sup>140</sup> Interview #16

<sup>141</sup> Interview #142

<sup>142</sup> A version of the regulations with all of the concerns of shelters incorporated was developed by the CLRWG , dated 09.02.2011. But when the international press broke the story on the 10<sup>th</sup> of February, they referred to the regulations in their original form, and fronts subsequently hardened, with MOWA also reverting to the original version in its press conference on the 15<sup>th</sup> of February.

of bringing them into government. The West, in particular was condemned for abandoning its commitment and for not staying the course; fighting for Afghan women through the defeat of the insurgents. In fact, there was nothing in the background or actions of the main protagonists in the shelter controversy, the Minister of Women's Affairs or Nasto Naderi, that suggested that they harboured the wish to bring the Taliban back into power. But in the flattening of the context in which the backlash against the shelters had emerged, there was no room for the other kinds of criticism (however flawed) against the shelters that had been articulated, such as alternative visions of service delivery or discontent with the NGOs and their lack of accountability.

### **VIII. Conclusions**

At one level, the controversies over the women's shelters in Afghanistan were over the sovereign claims that families could make over women (and the entire gender order that underwrote those claims). The shelters directly challenged prevailing notions that women were the wards of their families, and that the government and public institutions were duty bound to honour such claims by detaining women who appeared to be defying family authority over their mobility. By opening up a space into which conventional forms of social regulation of women's conduct could not reach, shelters potentially undermined family control over female sexuality. The initiative to nationalize the shelters must be seen as an attempt to accommodate such anxieties by establishing an official surveillance regime (or a guardianship system) that through admission policies and in the day-to-day monitoring of the shelters would (re) constitute shelters as spaces where social regulation over female sexuality and mobility could be maintained. While some of the shelters were quietly relating to such demands on a case to case basis, having such concessions formalized and uniformly imposed was unacceptable to the shelter managers and their international supporters.

The controversy over the shelters signified a logic of drawing up boundaries between good women, worthy of protection, and those beyond the pale of respectability. Like elsewhere, women's sexual purity was to serve as a measure of her eligibility for protection, confirming the notion 'that the most important thing to know about a woman is her chastity.' (Miller 2004) Moreover, in Afghanistan the parameters of respectability were extremely constricted, as showed by the Supreme Court directive that rendered all women out of family supervision

criminals. The supporters of the shelters mostly left undisturbed the validity of a distinction between respectable and immoral women. Instead they adopted two strategies. Either they tried to expand narrow notions of propriety, renouncing for instance the claim that shelters were places of ‘moral corruption’ and underlining the existence of cases of abuse so severe that women had valid reasons to live in shelters. In other words, rather than questioning the distinction between good and bad women per se they contended that women residing in non-family settings were not ‘bad’. Secondly, some of the shelters and their supporters circumvented the moral /immoral categorization by partially exiting the Afghan public domain altogether. Instead of directly confronting constructions of sexuality that sorted women into deserving and undeserving of protection, they leaned on transnational support, enabling shelters to operate more independent of the scrutiny of Afghan government officials and conservatives.

As it entered into broader circuits, the shelter issue was framed as a litmus test of the Western commitment to earlier pledges to help Afghan women, on the one hand, and of Afghan national sovereignty on the other. Embedded within these competing regimes were opposing visions of state domain and statehood; an older welfarist (and paternalist) model of the state against a neoliberal, subcontracting model. The shelters appeared as foreign ‘space’, defying both national and government regulation. The international financial and political support to the NGOs running the shelters thus served both to empower and to constrain them. It brought them victory in the first instance but perhaps at the cost of gaining a broader acceptance for the shelters and ensuring their sustainability. It also carried other costs, entangling the shelters in another loyalty- protection relationship in which allegiance to the NATO operation in Afghanistan featured as the price for the shelter’s continued existence. More than the EVAW law, the shelters could be said to work outside, rather than through Afghan government institutions. Although the EVAW law had been promoted and implemented with external funds and support, it nonetheless came into existence with the appearance of being a bona fide national product. Its supporters, both Afghan and international were at pains to erase any Western traces from the law, whereas in contrast, the shelters were more starkly transnational. They defied closer government regulation, bringing them into direct confrontation with Afghan officials. This was a more direct relationship through which Afghan women were explicitly protected by virtue of NATO military force, not Afghan government institutions. However the perils of drawing upon external guarantors is made evident by the processes examined in the next chapter, when segments of the international aid community, against the



explicit wishes of the women's rights activists, took to promoting customary justice processes.

## **Chapter 6: Seeking the “real” Afghanistan: The informal justice agenda**

### **I. Introduction**

One day in the autumn of 2009, I had a meeting with the AIHRC’s commissioner for women, Dr. Soraya Sobhrang. We had been discussing the EVAW law and I was about to leave when she brought my attention to something else, adamantly pointing to a document on her desk. It was a draft of a set of regulations that aimed to incorporate shuras and jirgas – informal justice mechanisms – into the state justice system. To Dr. Soraya, this would consolidate institutions that were deeply unegalitarian and misogynistic. She argued that jirgas and shuras tended to be co-opted by local power-holders, they were unaccountable, and disregarded the formal legal framework upon which gains in women’s and human rights depended. She and other Afghan human rights advocates had vehemently protested against these regulations but the initiative had come from international quarters and was going ahead anyway. ‘Why are the internationals doing this?’ she asked me with a mixture of astonishment and accusation. I asked myself the same question. Calls for recognition of informal justice brought associations to the ossifying effects of colonial rule by proxy; local chiefs bestowed with power from external authorities often turned more authoritarian, and ‘customary’ law receiving official recognition often meant that discriminatory practices became more rigid. That similar strategies could be vigorously pursued in post-2001 Afghanistan, where Western powers had declared the emancipation of Afghan women a core objective, and where so much funds and efforts had gone into building up a formal legal system and the institutions that supported it; parliament, a constitution and pro-woman legislation, seemed paradoxical.

But upon further reflection, there was a detectable orientation towards the local, the culturally -specific and the informal as alternatives to ‘Western’ statebuilding in many international circles in Kabul. I recalled that there had been a report a few years back that had set out comprehensive framework for a hybrid legal system in Afghanistan, a suggestion that had generated some controversy. And now these regulations seemed to suggest that a reform along these lines was on the cards. The conversation with Dr Soraya stayed on my mind. In the end I decided to explore these regulations in further detail; how the idea of such a framework had gained traction and what was becoming of the initiative. I started to track down the actors who had been involved in the process, obtaining different drafts of the

regulations as they evolved and eventually attended some of the meetings of the working group set up to develop the initiative. This chapter is the result of my investigations. It dissects the *governmental assemblage* (see chapter 1) of institutional practices, political imageries, scholarly repertoires and strategic considerations that made it plausible and feasible to promote and to work with informal justice and moreover, gave such undertakings importance and urgency. I demonstrate that the interest in and ability to boost informal justice processes in Afghanistan rested on a temporal alignment between foreign military forces, non-governmental organizations, academic expertise and neo-traditional local elites. Calls for recognition of and support to informal justice processes were premised upon assumptions about Afghanistan as defined by its non-stateness and localized governance, knowable (and manageable) through scholarly research and expert knowledge. In turn, NATO impatience over frustrated attempts to boost the formal justice system, in a situation where governance and justice were increasingly seen as integral to the war effort, made unearthing knowledge about Afghan-specific forms of governance a military imperative. Catering to these knowledge needs were a handful of research organizations who through the “mapping” of local power relations and dynamics could provide the *intimate knowledge* allegedly required for outsiders to strengthen and refine informal justice mechanisms in a sensitive and informed manner.

Although, as the events recounted below will make clear, this assemblage unravelled in the end, I argue that it nonetheless revealed the contours a specific and alternative set of governance relations. While certainly radically different from the universalistic ethos of earlier international visions for Afghanistan, tufted on statutory law and human rights, the form of governance made visible in the agenda to strengthen informal justice was not necessarily more Afghan-led. Rather I suggest that it amounted to an erosion of accountability. On the discursive level, privileging academic expertise as able to devise solutions about what was locally appropriate served to foreclose the possibility for public debate in Afghanistan on what were essentially political questions tied up with competing visions of statehood and the very currency of it. Institutionally, the governance assemblage through which international *engagement* with informal justice could take place was located not in national institutions, but in a parallel and ad-hoc constellation made up of non-governmental organizations (NGOs) and researchers. Finally, the erosion of accountability and national sovereignty was reinforced by military interest in the informal justice agenda, which moved it further out of public scrutiny.

## II. Defining informal justice

‘The informal justice system’ in Afghanistan is usually an umbrella term referring to all practices of solving disputes or offenses outside of the state courts, with the exception of adjudication primarily carried out by religious figures. More or less institutionalized, such practices vary across regions and population groups. Often privileged or considered the Afghan ideal type is the image of the jirga (Carter and Connor 1989:7). The jirga is a Pashtu word for a purpose-specific gathering of entrusted men tasked to make a decision or resolve a dispute. Parties to a conflict typically each nominate one or several representatives, their background and numbers depending on the nature and seriousness of the dispute or violation and the relationship between the parties involved. Through discussion, the representatives will agree upon a settlement to which the parties are expected to adhere. Failure to do so might result in social sanctions or even expulsion from the community. Focus is normally on restoration and compensation for the aggrieved party (Wardak 2011). Women seldom take part in the proceedings and can find themselves given away in marriage as compensation to the offended part; a practice called *baad*.

The representatives in a jirga are typically drawn from a small and relatively fixed ‘rosters’ of senior men (Smith 2009) recognized for their skills in mediation, reputation for fairness and integrity or general standing (or power) in the community. Although decisions are assumed by the parties to be in accordance with Islamic teachings, (Barfield, Nojumi et al. 2006 ) the explicit frame of reference (into which violations and appropriate compensation are placed) is generally local customs and traditions, sometimes explicitly referred to as Pashtunwali ( see page 68 ). Solving disputes through a jirga is regarded as a key tenet of Pashtunwali and can thus be understood as an exercise in affirming identity and community, whether positioned against adversaries, the state, other localities, ethnicities or tribes. Indeed, as Boesen (Boesen 1983) points out, the Pashtun tribal system as articulated in its idealized form, is ‘based on the obligation of the aggrieved party to assert and reestablish his honor and social integrity by demonstrating his ability to take revenge or get compensation’ ( 1983: 124).

It was these kinds of processes that increasingly caught the attention of various actors seeking to improve the Afghan justice system. This interest culminated in attempts to draft a national policy which would recognize informal justice mechanisms – often referred to as jirgas and

shuras<sup>143</sup> – and integrate them into the formal system. The document that Dr. Soraya had showed me in frustration in the autumn of 2009 was a version of this national policy. It is to the ( ill) fate of this initiative that the chapter now turns.

### **III. The ‘National Policy on relations between the formal justice system and disputes resolution councils’ (and its discontents)**

In April 2009, a working group was established in the Afghan Ministry of Justice, tasked with the creation of a national policy that would bestow government recognition upon informal justice mechanisms and formulate a relationship between these and the formal court system. Before this point, suggestions about a hybrid legal system had been voiced on occasion, most prominently in the 2007 UNDP biyearly Human Development Report for Afghanistan, which focused on justice sector reform. Citing a claim – later to be widely repeated – that 80 percent of all legal cases was “solved” by the informal justice system, the report had called for ‘a hybrid model of Afghan justice that articulates, in detail, a collaborative relationship between formal and informal institutions of justice ’ (UNDP 2007:4). According to this model, traditional justice institutions would cooperate with and work alongside the state justice institutions (ibid: 4). The report had proved to be unusually controversial for a publication of its kind. Its primary author, a UK-based academic and member of the Afghan diaspora, was reprimanded by government officials and the report itself was banned and any citations from it declared illegal in a decree issued by the Supreme Court ( Suhrke 2011: 214). The Supreme Court had objected to what it regarded as a potential negation of the formal system’s universal jurisdiction. Its officials were also accused of wanting to divert the considerable aid to the justice sector to themselves. Many Afghan human rights advocates also resisted attempts to boost the position of informal justice mechanisms. They viewed these practices to be open to abuses as they followed no codified law, sanctioned human rights abuses against women and children, and its ‘adjudicators’ required no formal qualifications or vetting.

Nonetheless, partly due to the lobbying of international donors, the idea of a formalized relationship between formal and informal justice was repeatedly reiterated in various

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<sup>143</sup> Shura means council or consultative process. Whilst jirga is a Pashtu word that refers more specifically to an ad-hoc gathering to resolve a particular issue, shura is of Arabic origin and used in the languages of both Dari and Pashtu.

benchmark documents formulated as part of the donor-led reconstruction process.<sup>144</sup> In fact, quite substantial attempts to “engage” with informal justice processes by various international agencies were already underway. International involvement with informal justice processes had slowly increased in the years following 2001 from a special interest field to a component of mainstream policy. The United States Institute of Peace (USIP), a research and policy institute funded by US Congress, had been an early advocate of working with the informal system, starting in 2002. Following on from several commissioned research publications on the informal justice system in Afghanistan, and the coordination of series of workshops and conferences from 2005 onwards, in 2008 USIP played an important role in securing the inclusion of a reference to the informal system in the Afghan National Justice Sector Strategy. According to USIP this reference ‘obligates the State to develop an official policy toward its relations with customary dispute resolution systems and to conduct activities that will strengthen these systems so that fair and effective access to justice for all Afghans is achieved.’<sup>145</sup> In early 2009, USIP set up what it termed *pilot projects*. These projects were to ‘test ways of designing or strengthening links between the state and informal systems to increase access to justice’ (USIP 2010:1 ) and were implemented either by USIP itself or by partner NGOs.

In the Southern province of Helmand, the UK government had also been working with informal justice processes for some time. In 2008, justice committees consisting of ‘representative groups of senior tribal elders representing all the major tribes and sub-districts of a district’<sup>146</sup> were established through UK initiatives in two districts in Helmand. A year later, they were followed by additional committees in other districts, and the committees were incorporated into the Afghan Social Outreach programme (ASOP), a programme set up to increase the visibility and presence of the Afghan government at the local level. Like the US strategy formulated later on, the involvement of the UK was rooted in military objectives. The UK government also funded a substantial research project on informal justice mechanisms across the country, which resulted in a series of publications by the Afghan Research and Evaluation Unit ( AREU), a Kabul-based research institute (Smith 2009; Smith and Lamey 2009; Gang 2011).

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<sup>144</sup> Such as in the Afghan National Development Framework (2008), the National Justice Sector Strategy (2008) and the communiqué of the 2010 Kabul donor conference.

<sup>145</sup> <http://www.usip.org/programs/projects/relations-between-state-and-non-state-justice-systems-afghanistan.USIP> website, accessed 29th March 2011

<sup>146</sup> Support to the Informal Justice Sector in Helmand - April 2009. Internal DFID note. On file with author.

Yet the international actors involved preferred to anchor their activities in a national framework, or at the very least, secure the formal observance of a key tenet of established aid practice; *local ownership*. So it was that in spring 2009, with the Supreme Court still ambivalent, if not outright opposed, a working group tasked with drafting a national policy was formed by the Ministry of Justice. It consisted of representatives of the main international agencies involved in justice sector reform, as well as USIP, AREU, the Ministries of Justice and Women's Affairs, the Supreme Court, the Afghan Human Rights Commission and the Afghan Women's Network, an umbrella women's rights organization. The working group had been established largely due to the efforts of USIP and the UK government, who subsequently became prominent actors in steering the process. Based on the UK experience in Helmand, the DFID justice advisor was actively involved in the attempts to get the national policy adopted, while USIP provided the secretariat for the working group.<sup>147</sup>

The working group's starting point were two drafts presented by USIP, and by the USAID-funded consultancy firm Checchi & Company Consulting, merged into one draft document. Most participants recounted the process as long and cumbersome. From the start, many of the Afghan female representatives strongly opposed the very idea of a national policy which recognized informal justice mechanisms:

*The policy would give the jirgas and shuras a lot of power. The policy said that it would legalize their decisions, build their capacity and rights, allow them to decide on smaller criminal matters. All of this was dangerous for women's rights and human rights.*<sup>148</sup>

The discussions crystallized around the question of whether the informal system was inherently harmful to women, a position maintained by many Afghan human rights activists, or whether it acted, at times, in women's favour, a contention put forward by Western researchers in particular. The debate frequently got heated, with Western participants suspecting the Afghan women activists of mere posturing, while they in turn accused their foreign adversaries of attempting to lock Afghanistan into a pre-modern condition. Eventually, the Afghan activists allowed the policy to go through. The grounds for this concession were somewhat different from the original intention of those who had first proposed the policy. Whereas the latter had envisaged a policy that would recognize the informal mechanisms and facilitate a formalized cooperation between these and state courts, the activists were now justifying the policy mainly on account of the fact that it would enable

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<sup>147</sup> Interview # 93, # 122 and # 123

<sup>148</sup> Interview # 16, 02.06.2010

increased state control over the informal system and limit its reach and excesses. Exhausted, all parties appeared happy to accept this tactical divergence of interpretation for the time being.

The second point of contention was whether informal mechanisms should be given jurisdiction over criminal cases. Whereas there was agreement that murder cases and other 'serious crimes' should be the prerogative of state courts, USIP and DFID in particular wanted to give the informal system jurisdiction over minor criminal cases. Others, including the Supreme Court, disagreed, arguing that this would be in contradiction with the Constitution and the (interim) criminal procedure code. Here, the international position prevailed.

Eventually, what emerged from the 10- month long process was a very brief document of less than four pages, considerably shorter than the initial draft that was presented to the working group. It stated that neither the formal nor the informal system could on its own meet justice needs in the country. It argued that the positive functions of the informal system should be strengthened and at the same time, practices and decisions that violated the human rights of women, men and children, including *baad* should be eliminated. The draft further stated that it was a matter of national policy to ensure that dispute resolution councils were free from influence of 'oppressive actors', and that no one should be compelled to appear before them. Furthermore, disputes resolved through the informal justice processes 'not in contravention of Sharia, the Constitution, other Afghan laws and international human rights standards' would be recognized as valid decisions by the formal justice system, after registration with relevant government institutions. The policy also stated that serious criminal cases remained under the exclusive jurisdiction of the formal system, whereas petty criminal cases could be referred to the informal system subject to the consent of the victim.

Having reached an agreement, the policy draft was prepared to be sent out for wider consultation. However, things took an unexpected turn when the new Minister of Justice, Habibullah Ghalib, declared his opposition to the very idea of a policy. According to members of the working group, Minister Ghalib could not see the value of a policy, and instead preferred having a law.<sup>149</sup> Moreover he had earlier been involved in the drafting of a law on peace councils, a semi -official additional layer of mediation bodies, and wanted to re-launch a draft law along these lines. Alarmed at the prospect of seeing the painfully crafted

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<sup>149</sup> Interview # 125.



policy being thrashed, the US and UK embassies attempted to convince the Minister to change his mind, which backfired. The Minister protested that Afghan sovereignty was being violated and appeared even more determined to replace the policy with a law. Thus, the process started all over again. A similar group of people started to convene and many of the same controversies were reopened. To avoid a repeat of the earlier long drawn out process, and after a few sessions where barely a paragraph had been drafted, it was summarily decided that the *Taqnin* (the legislation drafting department in the Ministry of Justice) would produce a first draft of the law and present it to the working group.<sup>150</sup>

Shortly afterwards, in September 2010, a draft was presented to the working group by the *Taqnin*. However the draft looked very different from what the international actors who had promoted the policy had intended. Compared to the policy agreed upon a year before, the new law proposal was decidedly more to the taste of those who wanted to use the process as a way of regulating the informal justice system and limit its power rather than a positive recognition of such processes. The draft contained none of the positive recognition of such mechanisms, instead Article 1 declared the purpose of its enactment to be ‘to regulate the affairs related to Shuras and Jirgas in the country’.<sup>151</sup> It stated that jirga members should have ‘complete knowledge of Afghan laws’ and be local residents,<sup>152</sup> effectively disqualifying a large number, if not the majority, of current jirga participants. Moreover, the draft law declared that those members of jirgas and parties to disputes who did not observe the law’s provisions should be prosecuted.<sup>153</sup> To their horror, those who had started the process of developing the policy realized that they had ended up with a result that effectively criminalized the very system that they wanted to promote.

Although USIP and others expressed their concerns, (see Wardak, 2011) the working group never reconvened and there was no sign of willingness from the *Taqnin*’s side to revise the draft law any further. But while the Kabul-based sceptics had succeeded, for the time being, in turning the process in the capital to their advantage, international engagement with informal justice had meanwhile proliferated significantly. The international military had made informal justice integral to its campaign against Taliban insurgents and in response the biggest donor, the US were allocating large funds to informal justice. With the increasing militarization of the justice sector the question of whether to support informal justice was

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<sup>150</sup> Working group meeting, Law on Dispute Resolution Shuras and Jirgas, Ministry of Justice 26.07.2010

<sup>151</sup> Law on Dispute Resolution Shuras and Jirgas. Draft 1. September 2010, Article 1.

<sup>152</sup> Ibid., Article 6.

<sup>153</sup> Ibid., Article 24

rapidly moving out of the purview of Kabul-based activists and officials, rendering formal sanction there irrelevant. However, before investigating the constellations through which these experiments with informal justice took place in greater detail, I want to explore the *rule of experts* (Mitchell 2002) revealed in both the contestations over the national policy /law and in the ad-hoc activities “on the ground”.

#### **IV. Expert authority and Afghan reality**

Invoking research findings as an authoritative claim to truths about Afghanistan, to which policy had to adhere, became an important feature of contestations over the place of informal justice in Afghanistan. The 2007 UNDP report had cited that more than 80 per cent of all disputes were solved by the informal system. The report’s front page illustrated this claim in unambiguous terms; a painting showed a circle, the smaller upper part was filled by a judge presiding over a court, with the figure 20 per cent inserted, whereas the larger part of the circle was filled by a gathering of mostly turban-clad men sitting around a table, purportedly engaged in informal dispute resolution, with the 80 per cent figure inserted. This claim became widely circulated and was frequently invoked as an argument for the recognition of or support to informal justice mechanisms. It became part of a broader body of academic and ‘grey’ literature asserting that the formal justice system was not only ineffective in most of the country, but that it was indeed alien to Afghan culture. Most Afghans, it was argued, preferred the restorative justice of their customary ways, and often resented the retributive justice practiced by the formal courts (Wardak 2004; Ledwidge 2009; Smith and Lamey 2009; Barfield and Nojumi 2010).

The employment of epistemic authority in discussions of the place of informal justice in Afghanistan displays traits of what Ludden calls an Orientalist practice of knowledge production (Ludden 1993). At the heart of this practice lies the claim of the existence of enduring if not permanent features of Eastern people and reality (“the real Afghanistan”). These features, being defined relationally and mostly in contradistinction to the West, constitute a “truth” to be discovered by scientific inquiry and to serve as guidance and justification for policy and governmental intervention. Ludden’s perspective alerts us to the importance of attending to the historical context and political effects of knowledge production. It reminds us that the interest in, and validation of informal justice mechanisms in

Afghanistan, did not appear in a vacuum, but within the parameters of a Western military operation that structured both empirical developments in Afghanistan, and the kind of knowledge that was useful and could be accommodated.

Applying this analytical lens, it becomes clear that since the time of the first encounters of British India with Afghanistan, the production of scientific truths about Afghanistan have been closely entwined with Western forays into the country. In turn, the particular Western routes of arrival and modes of entry into the country, coined ‘the keyhole of the Khaibar pass’ by Mousavi (Mousavi 1998:8 ) have generally privileged a tribal, stateless, independent and Pashtun imagery. As Hopkins points out, the early description of Afghanistan defined by its tribes by the early 19<sup>th</sup> century colonial scholar-agent Elphinstone provided a template for subsequent Western scholarship on the region (2008). Haroon (2007:14 ) further suggests that images and at times celebrations of autonomous and sovereign tribes, which by the latter half of the 19<sup>th</sup> century had become conventional wisdom in British official circles, in turn must be understood in relation to British strategic objectives in the “Frontier” region. She argues that the British Raj, in an attempt to establish a frontier zone of defence for British colonial possessions in India, wanted to wrest the area away from the Afghan king by asserting that the people inhabiting the area that today is known as Federally Administrated Tribal Areas ( FATA) were independent tribes with no history of living under a higher political authority. Later on, such notions were resurrected as Afghanistan took centre stage in the cold war conflict and aid workers, diplomats and intelligence agencies took to work with non-state actors ( the mujahedin) in what was then called ‘the liberated areas’ (Carter and Connor 1989) and with what was often celebrated as the country’s heroic tradition of resistance against central government institutions.

The intention here is not to suggest that such images were or are a mere invention, reducible to a Western plot. Instead my objective is to highlight the constant interplay between expert knowledge and Western foreign and imperial policy in Afghanistan and how – due to the particular history of the latter – this interplay has resulted in a scholarly template that privilege political imageries centred on the tribal, the non-state and the Pashtun. In turn, this underlines the importance of placing the truth claims of academics and experts in the historical context in which they are produced, in order to reveal their political underpinnings and effects. This perspective must also be applied to knowledge claims made and produced within the context of the most recent episode of large-scale Western involvement in Afghanistan, an undertaking I attempt here.

As Ludden argues, as Orientalist knowledge production becomes institutionalized and affirmed in government policies it quickly moves out of the hands of academics, and gradually takes the form of conventional wisdom, which ‘has become so widely accepted as true, so saturated by excess plausibility (..) that it determines the content of assumptions on which theory and inference can be built’ (Ludden 1993: 251). A publication from USIP (2010) illustrates how this dynamic was at play in discourses about informal justice, demonstrating that certain “facts” about the informal justice system had similarly become conventional knowledge, at least within certain circles. The USIP report presents findings from its aforementioned pilot projects, which forms the basis of recommendations. The document proceeds from a number of “facts” now treated as official wisdom: Noting that the formal justice system remains in a ‘severely dilapidated state’, something that could ‘take generations’ to redress, ( p. 2) the two authors <sup>154</sup> state that most Afghans anyhow resort to informal mechanisms: ‘Many experts believe that as many as 80 per cent of all disputes in the country are resolved in the informal system’ ( p. 3) They conclude that ‘given the many problems with the state justice sector’, ‘informal mechanisms provide the best prospect of providing sound dispute resolution services to most Afghans today and in the future’ ( ibid.).

A language drawing upon scholarly research as a source of authority and guidance for policy were also observable strategies in the attempts in the working group to promote the informal justice system and the need to recognize it, although there such strategies were only partially successful. In the discussions, some of the international participants were stressing that research demonstrated the widespread use of the informal justice mechanisms, its resonance with local people and an ambiguity, rather than a clear cut negative effect, when it came to its impact on women. Citing their research, they argued that women sometimes had positive experiences with jirgas and that anyhow, if jirgas discriminated against women it was simply because they were reflecting predominant gender norms.

Those who were against the policy, however, contested this line of argumentation. They contended that although research might show widespread use of informal justice mechanisms, this was because the formal system was inaccessible and malfunctioning, not because of an inherent preference for jirgas. Thus, it was necessary to improve the formal system rather than to endorse informal justice mechanisms. They further claimed that jirgas were institutionally biased against women, for whom the best protection against family and

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<sup>154</sup> Described as a political anthropologist and traditional justice specialist and a lawyer and senior rule of law adviser respectively.

community abuses was in the formal system. Even if research showed that women were at times present in these forums, this did not necessarily mean that women exercised any influence over the proceedings. The opponents of the policy also objected to the researchers' representation of Afghanistan. One member of the working group stated that the arguments put forward by the academics in the group had conjured up images of Afghanistan as a timeless land where autonomous *qabilas* (sub-tribes) constituted the largest unit of political and social life, as a result making prospects of 'national solidarity' and therefore modern democracy implausible.<sup>155</sup>

## V. Rendering informal justice governable, administrable ... and profitable

Whilst academic claims that informal justice mechanisms constituted an unalterable part of Afghan reality had found limited acceptance in the working group discussions in Kabul, expert knowledge was already integral to a series of ongoing efforts to make the informal field knowable and amenable to Western intervention. In general, the massive but increasingly troubled foreign military and aid operation generated a great demand for knowledge about Afghanistan, a demand reflected – and institutionalized – in a proliferation of research activities focusing on the country. Most blatantly in the service of military objectives – and therefore attracting considerable controversy – were the so-called human terrain teams – small groups of social scientists embedded within military forces. Their tasks included collecting local data on political leadership, kinship groups, economic systems and agricultural production (Gonzalez 2010: 118). However, the human terrain teams were but one extreme component of a much broader knowledge – intervention nexus, which in important ways bore resemblances to earlier Orientalist projects of making knowledge about Afghanistan available for the purpose of Western policy.

Yet there was also an important distinction. Such knowledge production was no longer conducted solely by Western government officials but had become more decentralized, marketized and outsourced. Moreover, compared to colonial times, academic and expert knowledge was operating with essentialized and enduring frames to a lesser degree. Instead, there was more emphasis on context, and emphasis on the fact that that local “reality” varies across time and space. However, earlier templates of Afghanistan as defined by its non-state,

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<sup>155</sup> Interview # 16, 03.06.10, Kabul.

tribal and Pashtun character were still evident. Indeed, the lack of knowledge about these enduring features of Afghanistan amongst Western policymakers was often presented as a key deficiency in the Western intervention and an as explanation for the difficulties it experienced. Moreover, the role of experts to make this reality accessible (to Western interveners) was still considered crucial.

The concept of *governmentality* ( see chapter 1) is useful in understanding the forms of power at work in the informal justice interventions. Governmentality draws attention to the particular forms of power that work through the various techniques of institutionalized bureaucracies (Li, 2007). These techniques include mapping, surveying, diagnosing and prescribing, in short, techniques that delineates a field and renders it ‘governable and administrable’ (Dean, 1999: 29). The effects of such practices are to constitute subjects, to authorize certain experts to guide action, and design solutions that can be accommodated within the register of the bureaucratic apparatus itself.

The USIP report referred to earlier (USIP, 2010) elucidates how informal justice was becoming, to some extent, a governmentalized field. In the report the justice sector as a whole is designated as a domain of intervention. The condition of the formal sector is problematized as deficient and in need of rectification. The solution to which is readily presented; engage with the informal justice sector. Although the overall tone is one of valorisation of this sector it is also stressed that support must be subject to certain externally mandated improvements; the excesses of informal justice should be corrected, its weaknesses addressed and linkages formed with the formal system.

The USIP report makes expert knowledge integral to the nascent programmatic engagement with informal justice. Having laid out the case for the *need* to engage with the informal system, the document goes on to offer findings and lessons drawn from its pilot projects. Many of the findings are centred around the importance of context, political sensitivity and research, thus highlighting the expert knowledge and skills required for the task at hand. The document states that organizations working with the informal system need to have an ‘intimate knowledge of the local political landscape.’ This often ‘demands a long period of research’ before the actual programme is started. The report notes that programmes that have been most successful are those where research was done most thoroughly and where implementers had the best understanding of local conditions. Project implementers should, thus, be familiar with the history of the area, the key power holders, ethnic and tribal

divisions, the reputation and loyalties of the formal justice system and local government officials, major sources of income, and who controls them, and the influence of the insurgency. Ignorance of the local context, and failure to appreciate the ‘inherently political nature of dispute resolution’, the report cautions, might undermine efforts altogether: Attempts to engage might be rejected by the local community as illegitimate, or might fuel tension and indeed political destabilization, for instance by favouring one group over another. The excessive and unequal disbursement of funds constitutes a particular danger in this regard.

Catering to the ever-expanding needs for local knowledge, generated by USIP’s informal justice project and a host of other international pursuits, were a handful of Afghan NGOs (many with Western staff in key roles) and institutes that had emerged specializing in conducting research responding to Western information needs – often referred to as “mapping” exercises. As enterprises (although most were explicitly not-for profit) dependent on constant funding flows for their continued existence, such organizations also had to reiterate the need for the services they produced. Perhaps the most successful and professionalized of these research NGOs was The Liaison Office (TLO, formerly the Tribal Liaison Office), which was founded as an Afghan NGO in 2003. According to its founders, it was established in response to a group of ‘elders of the local community representatives in the Southeast (Ahmadzai and Mangal tribes), who wanted assistance in engaging with the government and the reconstruction process’ (TLO Undated: 1). In 2011 TLO had 150 staff, and 10 field offices, concentrated in the South and East of Afghanistan.

Having moved gradually into research, the TLO website presents the organization as an entity able to fulfil a knowledge gap it pronounces as problematic, clearly speaking to NATO governments and donors as potential clients: Stating that ‘one problem in Afghanistan is the lack of research and understanding to guide overall engagement and development initiatives’ and that ‘TLO’s research and analysis section aims to fill this fundamental knowledge gap’ the website lists amongst its research activities:

thorough research of the ground context in given areas in order to understand community structures, decision-making and conflict resolution mechanisms, stakeholders and their sources of power (actor mapping), conflict-generating factors between individuals and groups (conflict mapping), local capacities for peace, existing

service provision, economic realities, and the impact of Afghan government and international development and stability initiatives.<sup>156</sup>

In a further effort to market the organization (using the language of enterprise) TLO announces that it ‘specialises in ’

‘topic-specific research, including targeted conflict assessments (e.g., land and resource disputes, kuchi migration and settlement issues), studies of informal and formal justice systems, policy analysis and exploratory assessments of areas of strategic importance such as the Afghan districts bordering Pakistan.’<sup>157</sup>

The TLO was one of the implementers of the USIP pilot projects on informal justice and one of a handful of organizations<sup>158</sup> who had established themselves through a portfolio of various mapping and project activities. Some of the work undertaken by these organizations was stand-alone research projects, such as ‘provincial assessments’– reports on the political landscape at the province level, or studies of why people join or support the insurgency. In addition the insertion of “research” or mapping as an integral part of various aid, reconstruction and “governance” projects, some of which were implemented by the research NGOs themselves, had also become commonplace. In this vein, what research confirmed as reality fed into programme activity, to be immediately acted upon. The researchers performed a vital role as necessary intermediaries, whose authority was constantly at work in deciding action.

One example of a programme with a built-in mapping component was the Afghanistan Social Outreach Programme (ASOP). It was conceived as a programme to extend ‘governance’ to the countryside of Afghanistan. Set up first in cooperation with the British in Helmand province it was subsequently to be replicated – although in a slightly modified form – in cooperation with the US, who funded its anticipated establishment in more than 100 districts. The main activity of ASOP was to set up councils at the district level. These were intended to strengthen support for the Afghan government, as well as provide information on insurgent activities (Waldman, 2008). The rationale for the councils was a concern amongst Western governments that a distant, overly centralized and unresponsive Afghan administration caused the population to support to the insurgency. The councils were tasked with bringing the

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<sup>156</sup> TLO Website: Research and analysis. <http://www.tlo-afghanistan.org/research-and-analysis>. Accessed 27th March 2011

<sup>157</sup> Ibid.

<sup>158</sup> Other ‘mappers’ were Cooperation of Peace and Afghan Unity (CPAU), WADAN, Center for Afghan Policy Studies (CAPS) and Peace Training and Research Organisation (PTRO)



concerns of local residents to the attention of government officials, especially regarding the quality and conduct of reconstruction activities, and with providing a forum for solving conflicts. They also proved useful for intelligence purposes. The mechanisms for selecting members to the councils varied somewhat, but the first step was based in a “mapping exercise”, carried out by one of the research organizations mentioned above, which produced a short list of power-holders in the area.

The usage of expert knowledge on Afghanistan and the integration of it into programmes generated or reinforced specific hierarchies. Local Afghans were, for the most part valued for their access to communities and their ability to achieve rapport, to operate undetected in unstable areas and to communicate in local languages, all of which made them essential to the overall enterprise. Their role was to be data collectors. The material they gathered was merely raw data, subsequently to be validated, refined and put into useful forms by trained experts, mostly foreign. The valorisation of the traditional and the local also enabled obvious hierarchies within the local social and political landscape. The discourse became empowering (in a narrow sense) for those Afghans who could claim (or establish) special access to knowledge of “the informal” or a special position within this field, whereas the sentiments of Afghan government officials were deemed opinions at best and irrelevant at worst.

Institutionally, this mapping industry formed part of an emerging governance assemblage (or ad-hoc complex) that rendered national and formal government institutions marginal or even superfluous and therefore compromised their claim of universal jurisdiction. Instead, bureaucratic power was channelled through NGOs, whose legitimacy was founded on special knowledge of Afghan culture and local context. While this knowledge gave the appearance of being *Afghan-led*, the fact that the entire endeavour was structured by larger fields of power was largely rendered invisible. Applying this perspective provides an important corrective to discourses that claimed informal justice was inherently preferable in Afghanistan and to Afghans. Most fundamentally the limited reach of the formal justice system in places like the Southern areas of Helmand, Kandahar and Loya Paktia could not be understood without reference to the ongoing military encounters between coalition forces and insurgents in these areas, which made them insecure for government justice officials to operate in. The reported large scale resort to informal justice mechanisms by local people could therefore be a response to a situation brought about by the international military operations, rather than an immutable cultural preference. More generally, the proliferation of interest in the informal and the traditional had taken place in the context of the growing difficulties facing Western

attempts to stabilize Afghanistan. The procurers of mapping services were, after all, the members of the NATO-led coalition, and despite claims of being Afghan-led, the direction of accountability in these activities went from the NGOs to Western capitals, via foreign embassies and military bases. As I show below, this tendency to circumvent national institutions became even more pronounced once the military expressed an interest in informal justice.

## **VI. Enter the military: Informal justice as counterinsurgency**

The promotion of the informal justice system became entangled in new dynamics as it was entwined with the strategies and rationales of the international military. With the start of the Obama presidency in 2009 the US military increasingly articulated its activities in Afghanistan as ‘population-centric’ counterinsurgency (COIN). The canonization of COIN as a distinct US army doctrine for certain military scenarios had been underway for some years. The COIN doctrine rose to prominence having gained currency as the formula that saved the US army from a total and humiliating defeat in Iraq. General Petraeus, who was largely credited with turning things around in Iraq had co-authored the *Counter insurgency manual* in 2006, a document which set out the main assumptions of COIN and translated these into operational guidance for the US army.

The COIN discourse explicitly drew upon the experience of the colonial wars of Britain and France as well as the American war in Vietnam. It formulated a present day COIN military strategy that focused less on eliminating the enemy and more on protecting the population. The population was cast as rational actors exercising choice between supporting the insurgents and the government. The key objective was to win its support, and thereby denying the insurgents a friendly environment to operate from. Thus, argued the COIN subscribers, the US military had to adjust from a dependence on overwhelming military force to a focus on “winning hearts and minds”. Winning hearts and minds was frequently understood to be possible through the provision of “good governance”. This meant that the soldiers would have to deliver governance or at the very least facilitate it. Their job was to be 80 percent politics and 20 percent soldering. The *Counter insurgency manual* preface stated:

Soldiers and Marines are expected to be nation builders as well as warriors. They must be prepared to help reestablish institutions and local security forces and assist in

rebuilding infrastructure and basic services. They must be able to facilitate establishing local governance and the rule of law. The list of such tasks is long; performing them involves extensive coordination and cooperation with many intergovernmental, host-nation, and international agencies.

The effect of the COIN's population centric outlook was to frame ever expanding fields (justice, administration, health, education) through the lens of military goals. Providing services and "improving" Afghanistan was no longer merely a good in itself or a way of proving to Western liberal audiences that Afghanistan was being developed. It became enlisted directly in the war effort as a way of winning over the population. Although a link between development aid and the prospect of defeating the insurgency had been made since the early days of the invasion <sup>159</sup> (Gilmore 2011), with the COIN doctrine improving governance became an indispensable and routinized part of the war effort and something that the military had to take systematic control over. Questions of governance and service delivery were thus problematized as a deficiencies that needed to be rectified, (Li, 2007: 7) and given the security implications, urgently so.

A legitimate government was generally regarded to be a cornerstone of population-centric COIN. However in the context of Afghanistan, this presented the international military with a problem. The Afghan government was an ambiguous partner in the eyes of many of its Western backers.<sup>160</sup> Massive international aid had not yielded the expected returns in terms of statebuilding and the Karzai administration was regarded by many Western officials as increasingly quarrelsome, overly corrupt and lacking in 'political will.' Given that the absence of good governance now was seen as a potential risk for the entire military venture, the military took to circumventing Kabul, delivering governance by working directly with province and district level officials (Lefevre 2009) and in part, by working with 'informal' structures and authorities. The military policy thus largely became to expand 'governance' rather than the Karzai *government* to parts of the country it had identified as key for winning the war. Centralised statebuilding had to give way to direct 'population control',<sup>161</sup> reminiscent of earlier colonial practices of indirect rule, but euphemized as 'localised governance'. To some, the partial abandonment of national frameworks constituted an inevitable trade off that the COIN doctrine necessitated:

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<sup>159</sup> Most notably through the establishment of Provincial Reconstruction Teams (PRTs)

<sup>160</sup> This was also used as an argument used by those who opposed COIN- who declared that with the present Afghan government COIN would never work.

<sup>161</sup> This formulation is from Antonio Giustozzi, Antony Hyman Memorial Lecture, SOAS, 15<sup>th</sup> March 2011

For the purposes of COIN there is not a ‘longer term’ in which to work. The longer it takes, the better for Taliban war aims. They are keen to portray the government as ineffectual and chronically corrupt. They are of course right. COIN operators, working locally by necessity, are not going to be able to correct the faults of a disastrously compromised elite, and a largely unco-ordinated international effort that might take decades to bring positive effect. The solution lies, as with so much in the world of COIN, in local solutions. Local solutions, however, often collide with national aspirations. The awakenings movement in Iraq, which extracted much of the sting from the Sunni resistance cells, was hardly compatible with aspirations for state monopoly on force. Similarly, local justice initiatives may not strictly be compatible with traditional ideas of the judiciary holding the monopoly on final adjudicative authority (Ledwidge, 2009: 8).

As the quote above indicates, the justice sector in Afghanistan was one of the sectors that became entangled in these rationales. The provision of justice was regarded as a ‘key service’ by promulgators of the COIN. The initial assessment by ISAF commander Stanley McChrystal, whose basic tenet was that ISAF had to change its overall strategy to COIN, stated that

Finally, ISAF must work with its civilian and international counterparts to enable justice sector reform and locate resources for formal and informal justice systems that offer swift and fair resolution of disputes, particularly at the local level. The provision of local justice, to include such initiatives as mobile courts, will be a critical enhancement of Afghan capacity in the eyes of the people, ISAF must work with GIRoA [ the Government of the Islamic Republic of Afghanistan ] to develop a clear mandate and boundaries for local informal justice systems (McCrystal 2009: 18)

It became commonplace to argue that in the justice sector the Afghan government and NATO found themselves in direct competition with the Taliban, as the latter often provided justice which although ‘extreme and harsh’ nonetheless had a ‘comparative advantage’<sup>162</sup> by nature of its swift application. In this situation, to prevent a ‘justice gap’<sup>163</sup> that could be readily exploited by insurgency, it followed that there was *no choice* but to work with the informal justice system. However, this articulation, which suggested a convergence of COIN, knowledge of Afghanistan, and informal justice was a tenuous one. It only partly gained traction and it was certainly not seamless. Instead there were unstable and temporal alignments, ad hoc experiments and a certain amount of disquiet.

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<sup>162</sup> *Request for Task Order Proposal (RFTOP), Rule of Law Stabilization Program (RLS) Informal Component United States Mission to Afghanistan. Attachment I: Statement of Work.* US government tender document. On file with author.

<sup>163</sup> *Ibid.*

The UK government had for some time carried out substantial experiments with support to informal justice in Helmand province. In 2008, councils of elders, described as ‘community justice support mechanisms(..) comprised of representative groups of senior tribal elders representing all the major tribes and sub-districts of a district’ were established in two of the districts in Helmand.<sup>164</sup> These two initiatives were later formalized under the ASOP programme and extended to other districts in the province. In addition, a mechanism called Prisoners Review shuras were established to process the high number of people detained by Afghan security forces. These shuras would decide whether individual detentions by Afghan national security forces merited pressing charges, and if so, whether to process the cases through formal or informal mechanisms. These shuras attracted considerable controversy due to their non-constitutional nature and for blurring executive and judicial functions (they were chaired by the district governors). They never had a large caseload and were mostly defunct by 2010 (Walker 2010).

The UK military saw themselves as practicing population centric COIN before the rest of NATO forces and the work with informal justice in Helmand was largely conceived and presented as a way of generating popular support for the Afghan government and international forces through the provision of justice as a public good<sup>165</sup>. More immediate practical imperatives of processing the large number of people detained by security forces were another important reason for the UK programmes. Based on the work in Helmand, the British DFID justice advisor also played a significant role in developing the national policy and generally advocated for an official recognition of the informal system.

The American government was more hesitant to make support to informal justice an official policy. In the summer of 2009, dissent was still reported within USAID on whether the agency should involve itself with the informal system. Opponents argued that there was no evidence (apart from ‘some DFID research’) that Taliban justice delivery was indeed translating into popular support for the movement, and hence the urgency to support the informal system did not exist.<sup>166</sup> However, the US government eventually took a clear position when it made support to informal justice one of the components of its overall Rule of Law strategy. As part of this initiative, nearly half of the funds of the USAID support to the justice sector were allocated to the informal system. The justification for doing so was

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<sup>164</sup> Support to the Informal Justice Sector in Helmand - April 2009. Internal DFID Note. On file with author.

<sup>165</sup> <http://www.helmandprt.com/delivering-justice.html> Accessed 18th April 2011.

<sup>166</sup> Interview # 8.

heavily grounded in COIN, repeating the now conventionalized wisdom that the weakness of formal justice institutions was a security problem which required ‘supporting the traditional justice sector in post conflict areas to provide immediate access to justice in support of stabilization efforts’<sup>167</sup>.

The USAID informal justice programme implemented by the private contractor Checchi was to take the form of a one year pilot project. It was to strengthen informal justice mechanisms, particularly in areas that had been ‘cleared’ by international military forces, through setting up networks of ‘village elders’ who would receive training and be invited to various events (USAID, 2011). The project also attempted to resolve specific long running disputes by convening various ‘elders’ across districts, and facilitating cooperation between elders and government officials ( Ibid). An assessment some nine months later found the pilot to be overwhelmingly positive. It recommended that support to informal justice ‘should continue as the mechanism can be rapidly revived through donor intervention to fulfil needs of a recently pacified community for justice while at the same time help prevent the Taliban from re-establishing themselves’ (USAID 2011: 31).

In discourses that framed informal justice through a military or security lens, a detectable emphasis emerged on how the informal justice system was not only delivering justice but also stability. It was suggested, both by various NGOs involved in “informal justice work”, as well as the military, that the informal system played an important function in preventing conflicts from escalating and thereby being exploited by the insurgency. Hence, the boundaries between justice, “stabilization”, and containment were unravelling, making it abundantly clear that the overarching objective was no longer the provision of justice for the local population, but the military victory of the NATO coalition.

## **VII. The informal justice assemblage unravels**

The original promoters of an official recognition of the informal justice system were not wholly enthusiastic about the integration of informal justice with COIN. Early advocates of a greater role for informal justice, to be found in institutions such as USIP and TLO, had been making overtures to the military and others about the importance of informal justice to COIN

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<sup>167</sup> *Request for Task Order Proposal (RFTOP), Rule of Law Stabilization Program (RLS) Informal Component.*

(USIP, 2010). Yet, perhaps stunned by the speed at which their argument had become popularized, these advocates then subsequently appeared somewhat uneasy about the entry of other international actors into a field that they had carefully delineated and cultivated. Certainly they expressed scepticism about the ability of military actors and larger government programs to apply the necessary fine tuned and context specific mode of intervention:

As in the past, coalition and ISAF troops may feel assured that they are talking with the correct local Afghan leaders when in fact, they may be unwittingly drawn into one side of an ongoing dispute. To avoid such pitfalls, it is critical that credible Afghan civil society partners be engaged after proper due diligence and investigation.<sup>168</sup>

They were also sceptical about large sums of money being injected into the informal system, which they felt might corrupt it and undermine the local legitimacy of the entire concept in the long run. Finally, there was some disquiet about the instrumentalisation of the jirgas and shuras for military purposes at the cost of a focus on how the informal system could be providing justice nationwide and not merely in insurgent-ridden areas.

For its part, the US military showed some frustration with the fine-tuned, context-specific approach to informal justice advocated by the original proponents of the informal justice sector, such as USIP. Clearly not institutionally equipped to deal with the intricacies of context specific community politics, something which was perhaps more within the skill-set of armies with imperial histories such as the British army, the US military was often more inclined towards a research approach that could be presented in terms of baseline, statistics and ‘best tactics, techniques and procedures’. This was made clear in a conference at one of the ISAF bases in Kabul on informal justice, where a number of ‘experts’ ( including this author)<sup>169</sup> had been convened in order to discuss how the military could utilise informal justice to solve disputes. The carefully argued presentation from USIP, which called for caution and analysis prior to ‘engagement’ clearly failed to gain much traction with the audience of senior military officers. Instead, it was the charts, statistics and calls for large

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<sup>168</sup> USIP Traditional Justice Workshop for General McChrystal, ISAF in Afghanistan. <http://www.usip.org/in-the-field/usip-traditional-justice-workshop-general-mcchrystal-isaf-in-afghanistan>. Accessed 18th April, 2010

<sup>169</sup> During a trip to Kabul in May 2011, I visited USIP ‘s Kabul office for an update on their informal justice work. I also asked if they had any suggestions about how to reach the relevant people within the US military who were working in this topic, as my attempts to set up a meeting had not led anywhere. Staff at USIP generously invited me to join them at a panel at one of the NATO military bases a few days later, where various ‘experts’ had been invited to speak about how the international military could best relate to traditional dispute mechanisms. I participated in this panel and made a few comments in response to the other presentations.



scale training programmes of jirga elders presented by the private contractor Checchi who had been awarded a \$28 million contract from USAID, which generated the most enthusiasm.<sup>170</sup>

But before this, in the working group in *Taqnin* that was tasked with developing national legislation, the military endorsement of the informal system was presented as a *fait accompli* to sceptical Afghan participants. In an apparent outbreak of frustration over the slowness of the drafting process in *Taqnin*, one of the internationals warned the Afghan members of the group that efforts to stop the informal system from gaining wider influence were futile. They should accept the need to have a law so they could at least gain some influence over the process:

*'You have to understand that the [foreign] military are engaging with the informal system...Italy, the US, everyone. The Afghan government might pretend that the informal system does not exist, but the military are all interacting with them. In Helmand, they are releasing prisoners. In Bamiyan, they might be doing something else. With this law you can at least ensure some harmony [of these engagements]. [Even] if the Afghan government, pretend they do not exist, the military will still do this [work with informal justice mechanisms.]'*<sup>171</sup>.

This in the end, did little to convince the Kabul-based activists and officials of the need to have a national law. Despite having secured a draft that was more in tune with their wishes to see informal justice mechanisms regulated rather than promoted, they preferred not to have any law or policy at all. In spring 2011, the law was taken off the cabinet's agenda through a promise extracted from the President through the lobbying efforts of Afghan human rights activists. At this point, prospects of getting a national framework for the ad-hoc experiments with informal justice seemed bleak.

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<sup>170</sup> Author's observation, ISAF Traditional Justice panel, Kabul 17.05.2011.

<sup>171</sup> International aid official in meeting in the working group, Ministry of Justice, Kabul 12.07.2010. The de facto disenfranchisement of central government institutions and national processes was not peculiar to the justice sector but part of a larger trend in which NATO governments instigated ad hoc experiments with justice, security and policing in the areas where they were operating, and subsequently sought the formal approval of national authorities -- often through substantial political pressure. (Lefevre, 2009).



## VIII. Conclusions

By the end of 2010, this informal justice assemblage – a temporal and nascent mode of governance through a configuration of expert knowledge, NGOs, traditional elites and military actors – was showing some cracks. Attempts to get local level ‘pilots’ and ad-hoc experiments sanctioned by national authorities had backfired. Those who had earlier courted the military about the utility of informal justice for military purposes were expressing a certain ambivalence. At the same time, the doctrine of population-centric COIN, which had made engaging with informal justice system a military necessity, was itself disintegrating. After a much publicized failed attempt to ‘pilot’ COIN in the district of Marja, reports from the South and East of Afghanistan suggested that assassinations of insurgents, – known as ‘kill-or-capture’ strategy – rather than protection of the population was becoming the strategy of choice. At the time of writing, population-centric COIN appeared more as a temporary and partial experiment, in parts directed to audiences in the West, rather than an all-compassing coherent policy.

Regardless of whether this assemblage would gain further traction, survive in a modified form, or completely unravel, it had revealed forms of power at work whose political effects are significant. In sum, the (potential) effects of the informal justice assemblage were an erosion of accountability and a disempowerment of local politics. In Kabul, expert knowledge steeped in Orientalist frames was used in attempts to override political contestation about the currency of informal justice mechanisms. Western academic work which purported to provide ‘Afghan-led solutions’ were thus doing the exact opposite, foreclosing the possibility of national debate on what were essentially political questions about competing visions of social orders and who were authorized to dispense justice. Expert authority was also integrated into programme design and implementation, replacing universalistic notions of rights and uniform frameworks, and effectively moving adjudication out of the purview of the capital and possibilities for national scrutiny.

The expert knowledge at work in the informal justice assemblage was mostly located within the nexus of external intervention and as a result, largely did not question its terms. It took the form of a functionalist anthropology, whose very premise, like earlier colonial ethnography, was to consolidate a social and political order defined by Western powers. Produced in this context, claims to be Afghan-led were misleading. Solutions that presented themselves as

culturally sensitive and therefore more legitimate omitted reflections upon the broader field of power, in which the source of the intense interest in “Afghan” solutions were objectives of military pacification, not a benign and disinterested sensitivity to local sentiments and the need to avoid outside imposition.

The negotiations (or tussles) over the informal justice agenda demonstrates how justice and conflict resolution are also ultimately struggles over jurisdiction, authority and sovereignty. Whereas the COIN discourse presented the military interest in informal justice as a matter of attracting popular support by providing justice, a closer reading also revealed a more immediate concern with establishing influence and presence in local areas in order to assert a measure of sovereignty. Military actors spoke of a ‘governance vacuum’ that had to be filled after the Taliban had been removed through military offensives. What was at stake here was a search of identifiable groups who could serve as local allies, and then to boost their authority.

In this respect, the military interest in informal justice did not differ from other historical processes in which rulers have set up or co-opted courts and justice bodies with the view to consolidate power. In the 19<sup>th</sup> century, Amir Abdur Rahman famously attempted, and to some extent succeeded, to use sharia courts to centralize power and undermine tribal autonomy (see chapter 3).<sup>172</sup> When in government the Taliban themselves carried out highly publicized and more routine displays of power through the dispensation of justice based on their particular interpretations of Islamic law. And, as the next chapter will discuss in more detail, as the insurgency gained force, they were also reputed to use the imposition of justice as a way of making their presence felt.

However, if a sovereign power was asserted or invoked in the informal justice assemblage it was not primarily vested in an Afghan central state. Therefore, the informal justice assemblage stood in sharp contrast to the EAW law assemblage, which operated through Afghan national institutions; the president, the ministries, the prosecution and the courts. As chapter 4 argued, the EAW law, as a constellation defining and intervening into gender violence in specific ways could in no way be reduced to a national project. Key parts of its ingredients were transnational; the funds that went into many workshops and training sessions

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<sup>172</sup> Hasan Kakar states that the "overall effects of these laws were that for the first time the inhabitants of Afghanistan began to learn how to obey a sole monarch and a uniform set of laws (Kakar, 1979). See also Ghani 1983.

about the law, and the political pressure that was applied both to get the law promulgated and subsequently implemented.

But the EVAW law nonetheless worked ‘inside’ national institutions, it did not make them obsolete. The informal justice assemblage was different; here national institutions were largely pushed aside. Rather sovereignty was to be found in a hierarchically structured configuration of localized authority and intervening external powers. The COIN advocates and its allies were at pains to state that they were involved in the restoring of the organic and authentic institutions of Afghans. These ‘authentic’ and ‘time honoured’ traditions, assuming timeless properties, were the primary rhetorical reference point of sovereignty and legitimacy, not the Afghan state. In actuality however, authority over life and death was simultaneously located in other institutions and actors, namely external interveners. In this sense, the ultimate sovereign affirmed in the informal justice assemblage revealed itself as an imperial one.

As Stoler and Bond (2006) suggest, modern imperial forms of rule are characterized not by demarcated territories under explicit colonial authority, but ‘by wide thresholds of partial sovereignties and territorial claims that produce contradictory legal entitlements and ambiguous human rights’ (2006: 95). The informal justice assemblage was indicative of an intervention process in which the local population were increasingly rendered “nationals but not citizens”, where local context and customs was accorded weight but national institutions were not. In the evolving geopolitical order, Afghanistan appeared to be reverting back to its slot as a “zone of exception” which, in effect, made its population, defined by its otherness, ineligible for modern citizenship or national sovereignty, instead fit to be governed through traditional authority, assisted by local research organizations and a cadre of experts, and in the last instance, validated by external powers.

In the end however, it seemed that the NATO coalition in Afghanistan could find no time for such a sophisticated form of governance. Faced with escalating insurgent pressure and growing impatience from their own political leadership, the military largely replaced COIN with a more brutal military strategy centred on targeted killings. Yet there were signs that the valorisation of informal institutions of governance might at least have produced a useful legacy for Western powers seeking to extricate themselves from earlier pledges of building a democratic, nation state in Afghanistan where ensuring women’s rights through formal institutions of justice featured centrally. It allowed them to claim that they were leaving behind a country in harmony with its own customs and culture, even if in reality, there was a

distinct possibility that such claims would be little more than a thin veneer coating an actual landscape of propped up militias, short term deals with local power brokers and continuing violence.

## Chapter 7: The Politics of Shame: violations that matter

### I. Introduction

In this final chapter, I explore the complex avenues of entitlement to protection and citizenship rights in Afghanistan from a different angle; through the trajectories of individual episodes of gender violence. I expand on the two cases introduced in the opening section of this text: the rape in Sarepul and the stoning in Kunduz. I also analyse two other cases in depth. The first of these two cases I initially came to know about through a lawyer in Kabul, who told me of an incident of rape by a government official of a young girl in his custody. However, it soon became clear that the rape was not the only violation that was linked to the girl. Through the reconstruction of the events preceding this incident a series of contestations over violations, and over blame, punishments and restorations emerged. The girl, whom I will call Nafisa, had caused a great scandal in her home area in Central Afghanistan when she defied her engagement as a second wife to an older man and escaped with a local servant.<sup>1</sup> They were headed for Pakistan when arrested and promptly sent back to their province, where Nafisa was sentenced to seven years of detention. It was when serving this sentence in the provincial juvenile detention centre that she was sexually abused by a senior government official. However, the arguments in her village focused not on this latter incident but on the attribution of culpability for Nafisa's elopement. Since Nafisa was engaged and still living in her parent's house, the question of who – the father or the fiancé – had held the guardianship of Nafisa was ambiguous; consequently whose honour had been affronted and who had lost face was up for negotiation.

The other case was from the province of Parwan, just north of Kabul. Like Nafisa, the headstrong Fereshta had fled her home and an unwanted marriage, in this case with her cousin. Unlike Nafisa, Fereshta had sought the help of a shelter, located in Kabul. However, through the machinations of her family Fereshta ended up instead in detention back in Parwan, accused of running away and of adultery with the neighbour she had escaped with. The court case that followed saw the judge considering multiple and contesting claims. Whilst Fereshta was formally accused of adultery, once she was back in Parwan, her family

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<sup>1</sup>All the names in this case are pseudonyms.

demanded instead that she be returned to them. Fereshta herself argued that her marriage to her cousin had been forced and declared her innocence of any improper relation with the neighbour. In the end, she was acquitted. But rather than returning to the shelter, she went to live with her maternal uncle through a ‘reconciliation agreement’ brokered by the local shelter and the Department of Women’s Affairs. A few days later, her in-laws invited her for a dinner, ostensibly to reconcile. As she left in the evening she was shot dead. The police promptly arrested most of Fereshta’s family, although only an ailing elderly uncle was eventually sentenced for her murder.

Probing the fault lines revealed in these four episodes I ask the following questions: What, in a series of interlinked events, were considered as violations or transgressions? Just as importantly, what was *not*? How did various public institutions become involved in dealing with these incidents? By doing so I return to the question posed at the beginning of the thesis; namely whether gender violence is increasingly becoming a governance issue in Afghanistan, and if so – in what ways? Public intervention often appeared to reinforce family claims over the control of women; violations that mattered were those articulated as illegitimate appropriations of kinship authority over female sexuality. However, this was by no means a predetermined outcome in all cases. Alternative forms of intervention existed, and were sought out with various degrees of success.

There were also additional dimensions to the way some cases were propelled into the public realm. I discuss these in the closing section of this chapter. What could at first and second glance appear to be a novel bid to expand government domains through invoking the state’s responsibility to protect family sovereignty over women, in fact contained other agendas. In order to fully disentangle these various layers we need to disaggregate ‘the state’. Rather than a singular, coherent entity which can serve as a potential guarantor of justice (however defined) the state, or more appropriately, the act of invoking statehood should be understood as a vehicle in struggles over resources, position and power. In other words, we need to situate appeals to the ‘state’ in a broader political economy; access to state power ( i.e. the power that successfully claiming to represent the state confer) is always differentiated and historically situated.

## II. The politics of shame

During the Afghan year of 1387, in the winter of 2008-2009, a judge in a province in central Afghanistan was entrusted with a task he would later feel he failed at. The judge's cousin was looking for a girl to be his second wife, and the family of the prospective groom approached him for help. The judge accepted the task, and when he heard that Ajmal, a farm labourer in the village had a good and decent daughter, he sent his female relatives to see the girl. They came back with reassuring reports – Ajmal's daughter was a good and hardworking girl, and the engagement was soon confirmed, the judge receiving from the groom-to-be a new suit as a token of appreciation for his efforts. But later on, he reflected on whether he should have been more thorough in his investigations. People would come to blame him for the scandal that followed, he recounted. They would say he should have asked more questions: Did the girl love someone else? At the very least, was she happy with the marriage? But as he said, how was he to have thought of such things? The rule was to send women, and women would observe whether a prospective bride is making tea, if she is looking after the guests, if she is beautiful. *'It did not occur to us that she could have a relationship with someone else- as a Pashtun girl, how could she have a relationship with someone else?'*<sup>2</sup>

But Nafisa in fact proved deeply unhappy with the engagement. At forty, her fiancé was considerably older than her 16 years. She was also to be his second wife. Nafisa's family was poor and it was assumed that bride price played an important role in her betrothal.<sup>3</sup> As was customary in many circles, once the engagement had been confirmed, her fiancé was granted nocturnal visiting rights. This kind of arrangement, referred to as *namzad-bazi*, (lit. engagement play) as the term indicated, was or could be, a time of playfulness and excitement when couples got to know each other, under a quasi-illicit air of mischief.<sup>4</sup>

This was evidently not how Nafisa experienced *bazi*, because she proceeded to make contact with a young man working in the village as a servant. He was the cousin of a radio host where Nafisa had called in to place a song request. The host had passed on her phone number to his cousin, and they had struck up a kind of courtship over the phone, then reportedly met in person and agreeing to run away and get married. Theirs was not an unusual story – since the

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<sup>2</sup> Interview # 97.

<sup>3</sup> Interview # 4, 30.03.2010.

<sup>4</sup> More recently, it has become common for the *nikah* ceremony to take place at this point, so that the couple are, from the perspective of Islamic law, married. But until the wedding feast has taken place and the bride moved to her husband's house, they are spoken of as engaged and cannot socially be considered a married couple.

arrival of mobile network coverage many Afghan girls attempted to escape unwanted marriages by seeking out co-elopers over the phone. But Nafisa and Amin's intention to escape to Pakistan was thwarted when en route in the eastern city of Jalalabad, they were reported to the police by the manager of the hotel where they were staying. They were detained and sent back to their home province, the scene of the crime. There, Nafisa was sentenced to serve seven years in juvenile detention for running away and for *zina*, and her co-eloper received a similarly lengthy prison sentence.

In the couple's village, Nafisa's fiancé and his family were outraged when they heard of the elopement. They immediately went to Nafisa's father, who agreed to hold a *jirga* to settle the matter. For two days, the proceedings went on, presided over by two elders from each of the families' tribes. The discussion centred around one issue; under whose supervision had Nafisa been when she escaped, and therefore whose shame (*sharm*) it was that this event had occurred. The fiancé and his family demanded two *baad*; one girl as a replacement for Nafisa, and one girl as a reparation for the dishonour that Nafisa's family had caused the fiancé with her elopement. But Nafisa's family rejected this demand. Her father argued that the fiancé had been visiting her, going to her room, and he therefore should have known of her relationship. Eventually, the elders reached the decision that one *baad* would suffice. She was to be Nafisa's younger half-sister, the daughter of her mother's co-wife. The latter found the arrangement deeply unjust; it was Nafisa and her mother who had proven themselves to be the bad (*kharab*) ones, why should she and her daughter have to suffer the consequences? Her protests were to no avail and after two days she gave in. Nafisa's half-sister was to be handed to the fiancé within ten days.

Meanwhile, Nafisa was in the juvenile detention centre in the provincial capital. A senior official arranged to have a room for himself in the compound of the detention centre. This was a violation of the rules, but his subordinates dared not protest. Through deceit and threats he sexually abused Nafisa, as a result of which she became pregnant. He had told her that he was in a position to influence her legal case, and Nafisa first told no one about what had happened. But when the prison attorney came on one of his regular inspection rounds of the detention centre she eventually spoke out, as he later recounted:

*I went to Nafisa's room and asked for permission to enter...( ..) When I asked her whether she had any difficulties with the juvenile rehabilitation centre staff she started crying and she was unable to talk for two minutes. I understood that she had a problem so I insisted she tell me. She said 'something has happened to me that I cannot tell you.' Then she started crying again and said the [ senior official ] has*



*raped me. ..(..)...he called me to his room and when I went there he asked about my case. I told him that I had escaped to Jalalabad with Amin. Then he said I will ensure your freedom. I will marry you to Amin and if he does not want to marry you I will. After he had said this I went back to my room. After one hour Jalaluddin who was his abettor came to my room and said that he [ the senior official ] wants to see you in his room. When I went to his room he locked the door and tried to hug me but I didn't let him. I told him but you are like my mama [ maternal uncle ]. He said who cares for the mama and he threatened me with his pistol and tightly closed my mouth with his hand and after that I couldn't do anything and he raped me. <sup>5</sup>*

After his initial shock and disbelief, the prison attorney got Nafisa to make a statement in front of all the detention centre staff, and then, in front of a judge. The official was subsequently taken into custody. At the primary court, he bribed the judge with a sum of around 20.000 USD and was acquitted. It was at this point that I first heard about the case, through the lawyer who had just been assigned to defend Nafisa during her appeal. At that point, a few months after Nafisa had testified about the rape and the first trial of the official had concluded, she was still held in the juvenile centre in the provincial capital, the location where she had been raped. The lawyer and human rights officials were trying to get her transferred to Kabul amidst speculations that she would be released and killed in collaboration between the official and her family. The UN's human rights section and the Afghan human rights commission (AIHRC) had also become involved. Since the case was sensitive and the girl's life appeared to be at risk these organizations decided to involve themselves in a discreet manner and to not make public statements about the case. The UN would contact the Supreme Court about the release of the official and the AIHRC would press the Ministry of Justice, which had jurisdiction over detention centres, to transfer Nafisa to Kabul. The lawyer spoke of his frustration about the lack of progress about these things, but a month later, Nafisa had been moved to Kabul and the official was under arrest again, awaiting trial in the provincial appeal court. After a few months he was sentenced to twenty years in jail, the absolute maximum sentence, in the provincial appeal court. The prosecution had based their case on article 17 of the EVAW law <sup>6</sup>, and articles from the Penal Code on the misuse of office.

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<sup>5</sup> Interview # 117.

<sup>6</sup> Article 17 ( Rape) (1) If a person commits rape with an adult woman, the offender shall be sentenced to continued imprisonment in accordance with the provision of Article (426) of the Penal Code, and if it result the death of victim, the perpetrator shall be sentenced to death penalty.

Nafisa was still serving her seven years sentence in Kabul when I glimpsed her from a distance at the end of the corridor in the juvenile rehabilitation centre there, heavily pregnant. She looked at me and then turned back. She did not wish to speak to me, the guards said. Other girls, volunteering to share their stories of how they ended up at the centre, told me that Nafisa was always fighting with the staff, who thought her insubordinate and difficult. At this time, inexplicably to the human rights officials who had followed her case, she had been assigned a new lawyer from a different legal aid organization. The new lawyer appeared to take little interest in her case and was impossible to track down for an interview. He was thought to be less committed to Nafisa's case than to the money that came with it.<sup>7</sup> But even if Nafisa could have her sentence overturned or reduced, her life was in ruins, and her most likely prospect for the foreseeable future was to live in a shelter.

But what had happened affected everyone involved. None of the families recovered their standing. Amin's family, afraid of revenge from both Nafisa and her fiancé's family moved back to their province of origin. For Nafisa's family the shame was the worst, and they eventually moved to another province in a different part of the country. This was not surprising to people who had followed the case. *'People will do phivar (shame) this family, they will say you are a family who could not keep a woman with yourselves.'*<sup>8</sup> said one. The fiancé and his family did not emerge unscathed either. Although friends and neighbours were trying to console them, the family still felt that their standing had been severely damaged.

*After a few days, people were saying to us that the dishonour (sharm) is related to her father. You do not need to be angry, as she escaped from his house and not yours. (..) But we don't have a friendly relationship with this family anymore. People and the tribe (quam) are blaming us. Because of this case we lost our honour amongst people.*

The fiancé was no doubt aware that he was an object of mockery in the area. People spoke of how Nafisa had used the mobile phone bought by her fiancé to make contact with her co-elooper, and how it was the day after one his overnights visits that she had run away.

The jirga proceedings were criticized from several quarters. Local jirga "experts", men who were reputed to be particularly knowledgeable about the traditions and rules of resolving

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(2) If a person commits rape with an underage woman even with her consent, the offender shall be sentenced to the maximum continued imprisonment according to the provision of Article (426) of Penal Code, and if it result the death of victim, the perpetrator shall be sentenced to death penalty.

<sup>7</sup> Interview # 6, 30.03.10. This person, a UN employee, complained that the last time he had try to get the lawyer to take a stronger interest in the case, he claimed to have lost the file ( June, 2010, Kabul). I was asked to mention this to the head of the Afghan bar association, which I did.

<sup>8</sup> Interview # 112.

conflicts, were dismissive of the way that the people involved had conducted themselves. They argued that the people in the jirga had been ignorant of real Pashtun traditions. They had completely failed to deal with the two persons who had escaped. What would have been appropriate would be for the family of the servant, Amin, who escaped with the girl, to give another girl in compensation for the girl who escaped. Moreover, the two elopers should have been found and the option of forgiving them or killing them should be exercised by the fiancé's family.

*'It was not a good and proper jirga, especially because Ajmal [ Nafisa's father ] was not a powerful man. The subtribe that this man belongs to is one of the weakest subtribes. And his subtribe did not support him in this case. If he was capable, if he understood how jirgas worked, he would not have accepted to give another daughter to this man. He should have formulated himself in this way: My daughter was not only engaged, she had had a nikah. She was your wife, so the problem is not mine. If you want to kill them it's up to you.'*<sup>9</sup>

This would have launched a challenge to the fiancé to admit "ownership" over Nafisa, an ownership that would have implied that he alone was responsible for rectifying the situation and thereby vindicating his own reputation. Another jirga expert concurred, saying that in this case, the best solution would have been to kill the eloping couple. But, he contended, the people on the jirga did not follow this principle as they did not actually seek to restore the rights of the people who had been wronged. He concluded that being weak, the people on the jirga instead sought to make peace between the two parties. He also blamed Amin for what happened with Nafisa after she was arrested.

*What happened was very shameful, and connected to what had happened before. The boy has to be blamed for both. If he had been knowledgeable about Pashtun traditions he would not have accepted to give the girl to the government. He should have escaped to an area where there was no government presence, where he could have asked for protection. What he did was that he gave a Pashtun girl to the government.*

A government official also disputed the jirga but as a trained religious scholar, his objections were based on religious grounds. He argued that having confessed to adultery, and that during the holy nights of *Ramazan*, the girl, a married woman should have been stoned and the boy punished. The problem with the jirga was that neither of the guilty parties (the elopers) were punished, and, moreover, that an innocent person ( the sister given in *baad*) was penalized in their place. Nafisa had made many mistakes, he said. If she had disagreed with the

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<sup>9</sup>Interview # 102.

engagement, she should have gone to the authorities to complain, not run away in secrecy, with a man and without telling anyone.

In fact, elopement was often the only attractive option open to girls who found themselves in a situation like Nafisa's – married or engaged against their will. If they chose to go to the authorities there was a good chance that they would just be sent back home, if not intercepted and detained by the police even before reaching that far. Leaving with a man offered them protection along the way. A couple was less likely to arouse suspicion than a young woman travelling on her own. It also promised a future since single women without family support were often condemned to a life in a shelter or in an unfavourable marriage arranged as a last resort. Ironically, then, constraints were stacked against them in such a way that young women saw embarking upon an affair as their only option, thus committing the most grievous transgression in the view of their communities and the government. The directive from the Supreme Court, prohibiting women from leaving their homes in the company of non-*mahram* men (see chapter 5) in effect closed off the most realistic option women had to escape abusive situations and coerced marital unions.

Unlike others, the religious scholar also faulted Nafisa for what had happened in the detention centre, arguing that the justice official had offered her a bargain for her freedom in return for sex. She had 'agreed to this intercourse, without regard for laws or traditions', and only when the justice official had failed to fulfil his promise did she make accusations of rape, he stated. On the other hand, many government employees pointed out that Nafisa should not have been staying alone as the only female in the juvenile centre<sup>10</sup>. A few people argued that the chief of the Department of Women's Affairs (DOWA) in the province was to blame for this. One female official from the province stated:

*In our environment, a mother is responsible for her daughter, to keep her safe and to control her. When a woman has a legal case, DOWA is responsible for her. But the head of DOWA [in Nafisa's province] has her own issues, and there is no activity of*

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<sup>10</sup> In fact cases of abuse of young girls (and quite possibly boys) in juvenile centers were fairly widespread. In one case, recounted to me by a number of human rights workers in Herat, two teenage girls had been arrested trying to flee to Iran with a man. Incarcerated in a juvenile center, they had both been abused by the head of the center, who staff said was forcing them both to come to his bed every night. The man had been sentenced to three years prison in the primary court in Badghis province, upheld in both the appeal court and the Supreme Court, but shortly after he was transferred back to Badghis to serve his term a presidential pardon was granted and the man was released.

*DOWA in this case. Both the boy and the girl are in prison, nobody has helped the girl.*<sup>11</sup>

The former head of DOWA said that when she was in her position, she would take women in difficult situations to her home:

*There was a girl from an insecure district, who came to the governor's office and she was referred to my office so that I could find a solution. Her problem was that she had no brother and she was in a land dispute with her cousin. People from [her district] were coming to me and threatening me. I said I don't have any special interest in this case, and I have no young son, and my husband is very old. I am just solving her problem. ...She was in my own house for three days and then there was a meeting of elders, who decided that she could marry anyone she wanted and that nobody could deny it. Many proposers came and she chose an MP. Now she is living with great honour in her husband's house.*<sup>12</sup>

But the present head of DOWA protested that she had security problems and had repeatedly asked for a women's shelter to be built in the province. She could not take anyone in to live in her own house because of threats and insecurity.<sup>13</sup> In other provinces, shelters sometimes served this function; the police would place women they had arrested in shelters when there was no special women's section in prisons or detention centres or no other women detainees. This blurred the distinction between protective spaces and places of detention, reinforcing the notion that women fleeing violence or abuse are criminals. The suggestions that the head of DOWA should, by virtue of her personal and political abilities and connections, serve as a protector of women, were an accurate reflection of how the office was functioning in most provinces. When the head of DOWA was a forceful personality with a political and family background enabling her to withstand pressure, the office could be an important ally to women who were in disputes with their families. In provinces where the DOWA chief lacked political clout or took less personal interest in these matters, DOWA was of little help, or even assisted families to press their claim over women. The latter was the case in the province of Parwan, where, as related below, DOWA was one actor in a series of events eventually leading to the death of Fereshta, who had fled an unwanted marriage with her cousin.

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<sup>11</sup> Interview # 107.

<sup>12</sup> Interview # 106.

<sup>13</sup> Interview # 109.

### III. The killing of Fereshta

Fereshta, from a village in Parwan near the provincial capital Charikar, had been engaged to her paternal uncle's son in childhood, and Fereshta's brother to her fiancé's sister. When Fereshta's father was martyred during the jihad, her mother married her late husband's brother, and the family moved into his household. As she became older, Fereshta came to dislike the idea of marrying her cousin, with whom she was now living in the same house. Many who spoke about her case later on suggested that it had been unseemly to expect her to marry a boy with whom she had grown up like a brother. Perhaps there was also a looming conflict within the family; the engagement between Fereshta's brother and the sister of Fereshta's fiancé had already been broken and the girl had married her maternal cousin instead. Whatever the case, when Fereshta was in grade nine she was told in no uncertain terms by her stepfather and uncle that her engagement would not be broken and she would marry her cousin, whether she wanted to or not.

When she started to protest her impending marriage, she was beaten and her wedding eventually proceeded against her will. Her mother spoke bitterly of how her daughter's wedding had been a cheap, rushed affair and how the cousin, who was illiterate, was widely thought of as an unworthy match for the striking and articulate Fereshta. The exact course of events was recounted differently by different people, but it seems that Fereshta was given a sedative and the marriage consummated while the bride was unconscious. Her grandmother, who played a pivotal role in the attempts to make Fereshta submit to the match, reportedly told Fereshta when she regained her senses that she was no longer a virgin and that she therefore had no choice but to stay in the marriage.

But Fereshta rebelled. Some 40 days after her wedding she left the house in Charikar, a two-hour drive north of Kabul in the province of Parwan, and headed for the capital. She travelled with a neighbour and their relationship would be the subject of much dispute in the period to follow. Once in Kabul, Fereshta went to a shelter. How she found her way there is unclear, but the shelter took her in and started to look at the possibility of getting her a divorce or to invalidate her marriage. Meanwhile, Fereshta's grandmother appeared in the Kabul offices of the Afghan Independent Human Rights Commission, 'presenting a formal letter issued by the Department of Women's Affairs in Parwan. The official who received the grandmother later told me: *'The letter introduced the grandmother of Fereshta saying that Fereshta has run*

*away but she is married. Please give her your cooperation so that she can find her granddaughter and take her back to Parwan.*<sup>14</sup>

The grandmother explained to the AIHRC that Fereshta was not only married but pregnant, and that due to her young age and innocence she had been tricked by another man with whom she had escaped. The AIHRC officer decided to call the various shelters in Kabul and once she found out which one Fereshta was at, asked her to come to the Commission where her grandmother was waiting. When Fereshta arrived and saw her grandmother, she started to shout to her about how she had been forced to marry her cousin despite declaring that she had not wanted to. The AIHRC staff decided that the case was more complicated than the grandmother had led them to believe, and asked the grandmother to return to Parwan, and for Fereshta to go back to the shelter.

However, a few days later, when Fereshta had been admitted to hospital for an appendix operation, the police arrived. How the police knew that Fereshta was at the hospital was never established. It was speculated that someone in DOWA, or at the hospital had tipped off the family, who had mobilized the police to arrest her. Stating that Fereshta was married and had run away, the police took her to the juvenile prison in Parwan, the province of the alleged crime. The prosecution put together a case whereby Fereshta was charged for running away and for zina, with reference to article 130 of the Constitution ( see page 85).

The grandmother, uncle and the self-declared husband appeared in court, accusing Fereshta of having aborted a child. Rather than having her imprisoned, they wanted Fereshta returned to them. Her defence lawyer, from one of the legal aid organizations, argued that the marriage had been invalid and that there was no evidence of *zina*. The judge proceeding over the case agreed, deciding that Fereshta should be acquitted, as there had been no proof of adultery. She was alone when she came to the shelter and she was alone when she came to court, he later stated.<sup>15</sup> He regarded the marriage as having been forced, (but there were no attempts to incriminate anyone for this) and contrasted Fereshta, ‘wise and beautiful’, with her illiterate husband.

Having been acquitted both in the primary court and the appeal court, which at the time, was presided over by the same judge due to staff shortage, Fereshta moved into the shelter in Parwan. Shortly afterwards, a ‘reconciliation agreement’ was brokered with the help of

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<sup>14</sup> Interview # 120.

<sup>15</sup> Interview # 139.

DOWA and the local shelter. Such agreements were commonly used throughout the country as a response to cases where a woman had fled her family. Arranged by shelters, AIHRC, the police or courts, family members would normally sign a letter where they guaranteed a woman's safety, and she would move back into the house she had escaped from, or with other relatives. In Fereshta's case, she went to live with her maternal uncle in a household different from that of her mother, uncle and husband, and this maternal uncle acted as the guarantor of her life.

However, a few days later, this uncle invited Fereshta for what she thought was a reconciliation meeting with her husband's family. Perhaps hoping that this was an occasion to settle matters with her extended family, she went. After the food had been served and it was getting dark, Fereshta declared her intention to return home to her maternal uncle's house. Defying her grandmothers' and other relatives' protestations she made her way out of the compound, but as she reached the gate she was killed by two shots from a single-barrel shotgun. The police, alerted by neighbours hearing the shots, arrived promptly at the scene. There they found Fereshta's body and most of the family members, whom they arrested. Her husband and her father in-law were not among them, having fled immediately after the murder. Nor was Fereshta's mother, who had been sent away a few days before the dinner party.<sup>16</sup>

In the trial that followed, an elderly and frail relative of Fereshta – her grandmother's brother – figured as the perpetrator. He had voluntarily confessed to the murder, although Fereshta's mother and others claimed that the main culprits had been the husband, his father and the grandmother, and that the old man was put forward as the scapegoat. His age meant that he was expendable as a breadwinner and that he was unlikely to be executed. In court, the grandmother had shown a video. It was of a woman dancing lecherously and appearing drunk. In a bid to portray the victim as a woman of loose morals and therefore make her murder less of an offense, relatives claimed that this girl was Fereshta, something that was refuted by witnesses called in by the court. This and other attempts to justify the murder failed to convince. The elderly uncle was sentenced to 16 years in prison for Fereshta's murder, within the maximum range of sentencing.

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<sup>16</sup> Interview # 100 and # 101.



#### IV. Violations that matter

In various ways, the four individual episodes of gender violence discussed in detail in this chapter all became public issues in the sense that they involved attempts at dispute resolution, punishment or redress through fora and mechanisms of an institutionalized nature and outside the immediate family. Fereshta's family mobilized DOWA, the police and the AIHRC in attempts to get Fereshta back. They claimed that she was a married woman, implying that the government therefore had an obligation to return her to them. Fereshta, on the other hand, retorted to state officials that her marriage had been forced and should be annulled.

The elopement of Nafisa and Amin became a government matter at the point when they were arrested by the police in Jalalabad, a routine government action on suspicion of elopement. But to Nafisa's family the government did not appear as an ally, but rather as an irrelevant or alien institution, or perhaps out of reach. Once official bodies had detained their daughter, they made no attempt to contact her or follow her case in any way, and neither did Nafisa's in-laws. Instead, the central violation that preoccupied those in Nafisa's home area was the failure of her family to deliver their part of the agreement between two families when Nafisa ran away with Amin. ( Although, as we have seen, an alternative reading of events, which partly gained traction and saved Nafisa's family from having to deliver two *baad*, held that it was Nafisa's fiancé who was to blame for her escape.) The forum through which the conflict was settled was public but informal and outside government scrutiny.

The rape in Sarepul in February 2008, referred to in the introduction of this thesis, appeared at first glance to be an unusual case of a family's pursuit of justice through the government courts for the rape of their daughter/ niece Bashira. As will be recalled, the uncle of the girl raped by Najib, son of a local MP and his friend, went on national TV calling for the government to see that justice would be served. Having gone to Kabul to pursue the case he spoke on Tolo TV:

*I am the father<sup>17</sup> of a 13 years old girl who was kidnapped and then raped by son of Haji Payenda, a member of parliament (..) Several times through Aryana Television and other media the issue has been made known to all the government officials and even president Karzai (...) all the ministers, all the parliament members are aware of the incident and know everything.*

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<sup>17</sup> Although he was in fact the girl's uncle, he often referred to himself as the father, since Bashira's actual father was ill and could not represent her.

*(..) I have just one question for Mr Karzai: For the sake of God, if this had happened to your daughter, what would you have done? Then would you have felt my feelings? Only two days ago, you sacked the attorney general<sup>18</sup>, and since then all the offices that I approach reject me by saying that even your attorney general has been fired. Today in the public health office, even the prosecutor that is dealing with my case tells me to go away and that now that the attorney general is no more in office no one is going to listen to your stories anymore. Was justice there only in the attorney general? By sacking him, did his office, his laws and everything also vanish? Is there no system anymore? Should we just abandon our case and mind our own business? Once again I am repeating it; if this would have happened to your daughter Mr. Karzai, Qanooni, Chief Justice and Attorney General, would you have tolerated it? Would you have just watched?*

*If we are traitors, if our case is unfair, and if our accusations are false, Mr. Karzai if you have any gheirat (honour) then please kill us and drive over us. If you don't have gheirat then may God's curse be upon you and your whole clan, whoever you are.<sup>19</sup>*

This, it seemed, was a demand that the Afghan state carry out its formal duty of punishing rapists – a brave leap of faith in the government by entrusting it with a matter conventionally considered deeply private – and a call for the government to rein in powerful people and uphold the rights of the weak. In short, it appeared as an attempt, from below, to redraw the boundaries of state and society domains; to expand the scope of state responsibility and to make the government accountable to normal people.

In contrast, the stoning in Kunduz in August 2010 from a distance looked like a brutal, top down imposition of Taliban justice on a community that was already in the process of sorting out the dispute in a more conciliatory way. Qayam and Siddiq had been stoned to death for *zina* following the intervention of the Taliban who had insisted on applying sharia justice despite the fact that negotiations over a settlement between Qayam's and Siddiq's families were still ongoing.

As such, the episode could be understood as a classic example of contestations over legitimate authority, not unlike the stoning of a Safi women narrated by Edwards (Edwards, 2002) in which a woman was stoned to death for adultery by mujahidin commanders contrary to the wishes and sentiments of her tribe.<sup>20</sup> But, as I will show below, it quickly became evident

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<sup>18</sup> In an unrelated event, President Karzai had dismissed Attorney General Abdul Jabar Sabet on the 17<sup>th</sup> of July 2008.

<sup>19</sup> Tolo TV, 19<sup>th</sup> July 2008.

<sup>20</sup> Edwards recounts a story from the 1980s of a young woman who denounces her husband as he goes to complete his military services with the communist government, in an area where all other young men are supporting the jihad against the Soviet- backed regime. She convinces her male cousin to escape with her, but

that the conflict dynamic in Kunduz was more ambiguous than a matter of mullahs and their brutally rigid religious dogma, imposing themselves over tribal authority, which is how Edwards reports that the Safi stoning was perceived locally. Notably, in Kunduz, the family of Siddiqa voiced no protests over the execution of their daughter.

What were the publically articulated forms of violations in these cases? I would like to suggest that what these episodes have in common is that the central offense is the loss or infringement of family or kinship sovereignty over female relatives and family members. The loss of such control could take various forms: rape, a girl's defiance against her family, or the failure of one family to deliver a bride to another family as promised. In Fereshta's case, her family, led by her grandmother, went to government agencies asking them to return her to them. Fereshta's departure was framed as an illegitimate act of escape where the government had an obligation to restore the runaway. It proved difficult to track down the exact details of dynamics that led to Fereshta's arrest and return to Parwan. Given the tragic outcome of the case, widely considered an unjust killing, it was not surprising that the various people involved tried to dissociate themselves from the events preceding it, and certainly from the act of sending Fereshta back to her family. However, it seems that the first port of call for the family had been the DOWA, who evidently equipped Fereshta's grandmother with the letter that asked for the authorities' cooperation in retrieving her grandchild.<sup>21</sup> The family, having discovered Fereshta's whereabouts due to the intervention of the AIHCR, then got the police in Parwan to send a request to the police commander of the Kabul central zone to find her and bring her back to Parwan. So far, the government had recognized the family's claims on Fereshta by acting on their demand to bring her back to Parwan, but the events that followed showed that "the state" was an ambiguous guarantor of family claims over women. In the last phase of her life, government institutions sided with Fereshta. She was acquitted of any crimes in court, and the court did not recognize the family's absolute power over her; when she was killed, the court sentenced her grand uncle to 16 years in prison for her murder.

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they are caught by *Hizb-e Islami*, one of the mujahedin parties, and she is sentenced to death by stoning by a religious judge, recently returned from Saudi Arabia, even if the local community widely endorsed her elopement. To the narrator in Edward's book, this imposition symbolized the rising power of mullahs in Afghan society. Previously dependent on tribal leaders, they were now asserting their power more independently (Edwards 2002).

<sup>21</sup> The head of DOWA who evidently had equipped the grandmother with the letter, and later brokered the guarantee with the uncle with whom Fereshta was to live, was extremely reluctant to talk about the case. She repeatedly cancelled appointments, mostly telling us she was in a workshop. This was also the case when we one day showed up at her office to speak to her assistant and found her at her desk. She then unenthusiastically agreed to an interview.

In the case from Sarepul as well, the state was invited to act as a guarantor of family honour and the protection of women against the predations of powerful parties. In the media and in the accounts of the many human rights organizations and politicians who supported Bashira's uncle who had made the complaint, the way the family had chosen to make the rape public was typically spoken about as momentous development:

The girl is thirteen years old and she has been raped, and yet by Afghan standards she is one of the luckier ones. Her family has recognized her trauma and is trying to get her some sort of justice; in many families, she might be viewed as an object of shame and thrown out. The fact that her family members have chosen to stand by her, and that they even spoke out on Afghan national television last month, is an important change in how Afghans view the abuse of women (Kargar 2008).

However, closer attention to the language used by the uncle Sayed Noorullah shows that the case was not framed exclusively as an offense against Bashira, who had suffered the rape, but also, if indeed not primarily, as an offense against Noorullah himself. For instance, when recounting to me how he had been offered money in order to withdraw his complaint, he indignantly said: *We are Afghans. And in our custom, taking money in such cases is like selling your namus.* The government and the president were denounced as allies of usurpers people's honour. They had allied with warlords and oppressors and as a result, they were selling the *namus* of ordinary people. Noorullah recounted, with some embarrassment, how he had in anger hurled a great insult at the president even when called in for a personal audience, a meeting which had taken place following his denunciation of the country's leaders on national TV ( see above). After this rather strongly worded speech on TV (*'Mr President..if you don't have gheirat then may God's curse be upon you and your whole clan, whoever you are'*) the president's office had demanded that Noorullah be immediately brought in to speak to Hamid Karzai. There, the uncle continued to use strong language. The Taliban government might have been brutal and unpopular he had said, but they were not *be-namus* (without honour). They had not been selling people's honour.<sup>22</sup>

In the other two cases; namely the stoning in Kunduz, and Nafisa's elopement there was no call on the government to maintain people's honour- in other words, to maintain male authority over female family members. There were several reasons for this. The district of

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<sup>22</sup> This face to face denunciation of the president as basically a man without morality, a purveyor of honour must have taken him back, but to the relief of Bashira's uncle the president reacted calmly, and expressed his sympathy for his plight.

Archi in Kunduz was outside government control, as illustrated by the government's inability to arrest anyone later on, despite the outrage that the stoning produced. Nafisa's family, by contrast, was living in an area with greater government presence, but they were poor, and probably unable to call on the government to retrieve Nafisa and return her to them, in the way the better connected family of Fereshta had done. Nevertheless, the offense against kinship prerogatives over female sexuality figured as the central violation in these two episodes. The case in Kunduz appeared, at first, to be framed as a different kind of violation; Abdul Qayam and Siddiqa were punished for the offense of *zina*, a crime against God. (The act of stoning in turn, was what was considered as violence as reported in Afghan and international media). But upon closer examination of the events surrounding the stoning, a more ambiguous picture emerges, a picture where the family's sovereign rights over their daughter also played a part. Once it was clear that Siddiqa had eloped with Qayam, around 200 men of her Turkmen tribe surrounded his house, threatening to enter it and take away the women inside unless Siddiqa was returned. In their view, by eloping with Siddiqa, Abdul Qayam had stolen a woman from her family and tribe, thereby launching a direct attack on their standing in the community.

And a lot was at stake. Siddiqa's grandfather had been Mulla Qali, the namesake of the village itself. For such a family to be seen to be unable to keep their women under their protection and control, to appear vulnerable to unauthorized access, was nothing less than intolerable. Later on, when Taliban started to investigate the case, it was framed very differently, as the crime of *zina*, a crime against God rather than an offence to Siddiqa's family. But the latter's agenda proved not entirely divergent to that of the Taliban.<sup>23</sup> When Qayam and Siddiqa arrived back to Archi in Kunduz – begged to do so by Qayam's family who were under siege by Siddiqa's tribesmen – Siddiqa's family refused to let her stay under the protection of the former *woleswal* (district governor), who had guaranteed to the couple that they would be safe if they were to return. The former *woleswal* was from the same tribe as Qayam, and was therefore not considered trustworthy by Siddiqa's father, who insisted she and Qayam should stay with a village mullah whilst negotiations between the families took place. It was this mullah, considered a Taliban sympathizer, who opened the door for the Taliban to start investigating the case. Nothing suggests, however, that Siddiqa's father opposed the intervention by the Taliban. A relative of Qayam later claimed that Siddiqa's

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<sup>23</sup> Siddiqa, like Fereshta, had been engaged to her cousin, so unlike in Nafisa's case, there was no question of answering to an external family. It was Siddiqa's family, not her fiancé who played the leading act in the aftermath of her escape

father had said that *'I will hand over my daughter to Taliban and will ask them to order what religion orders'*, doubtlessly knowing that stoning might be the outcome.<sup>24</sup> The researcher who carried out the data collection in Kunduz opined that to Siddiqa's father, the only acceptable outcome was the couple's death: *I believe that in our culture, this [an elopement] is a very big shame. It is about the honour of the tribe. Even if 10 girls had been offered as reparation I believe he would do the same [not accept a reconciliation agreement with Qayam's family].*<sup>25</sup>

The events in Kunduz bring to the foreground how gender relations are forged out of contingent struggles and alliances. In terms of the end result, there appeared to be no great difference in how Siddiqa's father and the Taliban sought to solve the case. This convergence between family assertions over women and the regulation of sexuality by public authorities is not unusual. Historically, Islamic legal traditions have often incorporated and modified gender ideologies placing great emphasis on controlling female sexuality and protecting paternity. Yet, as previous chapters has showed, the exact arrangements sanctioned in Islamic legal practice has varied according to time and place, and this is also true for how official bodies defined and enforced punishments for the crime of *zina*. For instance, Mir-Hosseini and Hamzic argue that in the early 20<sup>th</sup> century, as Muslim countries modernized their legal systems, the application of classical Islamic law generally became confined to the field of family law. *Hadd* punishments, including stoning and lashing for the crime of *zina*, while rarely explicitly abolished (Peters, 2005) became legally obsolete (Mir-Hosseini and Hamzic, 2009: 21). However, with the resurgence of Islamist political movements towards the end of 20<sup>th</sup> century, many countries saw attempts to "re-Islamise" criminal law, particularly as new leaders, often having come to power through military coups, sought to derive political legitimacy from a declared project to restore the Islamic credentials of society. In this manner, a return to classical fiqh in penal law was presented as a purification of society returning it to a stage of 'pure Islam' prior to Western contamination.

In Pakistan, for instance, having come to power through a coup d'état, Zia ul-Haq promulgated the infamous Hudood ordinances in 1979. One of these, the Zina ordinance, criminalized extramarital sex and provided *hadd* punishments for such offenses under certain conditions (Lau, 2007). It thus formed an important part of General Zia's declared purpose of taking power, namely the need to cleanse Pakistani society and make it more Islamic. But

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<sup>24</sup> Interview # 126

<sup>25</sup> Personal communication with researcher based in Kunduz, Kabul, 14.05.2011

the divinely ordained regulation of sexuality in turn provided a vehicle for those who wanted to reinforce sovereign rights over daughters and wives. Khan finds that, in practice, the Zina laws in Pakistan also became an instrument for family members to be used against women who had married without their permission or otherwise defied the family's claim over their bodies (Khan 2006). More generally, Mir-Hosseini and Hamzic observe that 'wherever classical penal laws have been revived, and in whatever form, nearly all those sentenced under zina laws to lashing, imprisonment or death by stoning have been women.' ( *ibid.*: 27) They suggest that the criminalization of women's sexuality enabled through the revival of zina laws 'provided contemporary patriarchs with an efficient and novel means to further assert their control' ( *ibid.*: 12).

By and large, a similar pattern appears to have taken place in Afghanistan. As the legal system became codified and modernized, starting with the *nizam-namas* of Amanullah in the 1920s (see chapter 3), *hadd* punishments were assigned a largely symbolic place in criminal law. Although literature on this question is scarce, it seems that stoning and lashing as punishments meted out by government courts for the crime of *zina* was a rare occurrence in the 20<sup>th</sup> century. Only with the emergence of the mujahedin and then the Taliban came the call for revival of 'Islamic punishments'. Again, there is little systematic material on the degree to which *hadd* was actually implemented, and certainly there is little knowledge about to what extent families concurred with physical punishments for adultery when these were ordered by religious scholars with explicit reference to sharia. The stoning in Kunduz, however, illustrates a similar dynamic to the cases found in Pakistan; a congruence between familial and Islamic injunctions against female sexual autonomy; through an alliance in which patriarchal claims and an aspiring sovereign power – the Taliban insurgents – found common ground. Because even if Siddiq's family approved of it, there could be no doubt that the stoning was not just about transgression of Qayum and Siddiq, but also served as a strong political message that Taliban was in charge in the area and that they were uncompromising in implementing Islamic tenants.

But this particular way of allying kinship with public power—through a public execution of an adulterous couple—espoused a fragile hold. The stoning horrified many Afghans. There were certainly several elements to this reaction. The fact that the stoning could take place, and the subsequent inability of the government to punish or even prosecute anyone for the act, had political implications. It showed the impotence of the Afghan state and the international

coalition supporting it and starkly raised the spectre of the re-emergence of a Taliban-controlled Afghanistan. But there was also a strong reaction to what appeared, at least at a distance, as a brutal, impersonal imposition by a body outside the family, the village and the local community. Because whereas the killing of an adulterous daughter or wife (or one alleged to be so) by her family or husband was a common occurrence in Afghanistan, the public execution for adultery by a government, or rebels aspiring to state power was not.

Yet paradoxically, even if the stoning in Kunduz generated strong reactions, few if any Afghans would publically denounce the *principle* of stoning of adulterers. Instead, the protests against the Kunduz stoning were on procedural grounds. The investigations had been too quick, the stones thrown at Siddiqa and Qayam had been too big or the punishment had been carried out outside legal channels by unauthorized actors. The reluctance to take a public stance against stoning per se testifies to the hegemonic position of classical fiqh. There was little political space to challenge the twin notions that the laws of Islam were immutable and that Afghanistan, as a Muslim country, had to uphold them. At the same time, whereas it appeared politically impossible to repudiate stoning in principle, there was a willingness to challenge a much more common occurrence – the family's prerogative to kill adulterous women. But only up to a point. In parliament, as we have seen in chapter 4, article 398 of the Penal Code, which provides a maximum two year prison sentence for those who murder female relatives or wives caught in the act of adultery, proved difficult to challenge directly. It appeared, therefore, that the adulterous woman (or the woman running away) had a tenuous right to protection in the formal government courts as well. To some extent, the question was not whether she was to be put to death, but who held the right to obliterate here, and under which circumstances. The balance seemed to be tipped towards her family and her male relatives, which was partly why the stoning in Kunduz generated such strong reactions, at least nationally.

## **V. Counter-discourses of violation**

However, far from all instances of family claims over women were recognized by public institutions. What emerges from the four cases is a more fluid field. In the case of Fereshta, the government only paid partial heed to the family. Against their wishes, the court refused to find Fereshta guilty of any offense, nor did it in the last instance, agree to send her back to her



family, at least not directly. Instead, it was the broader societal constraints that seemed to make Fereshta go to live with her family, a point elaborated upon in the section below. And when Fereshta was later murdered for having refused to submit to her family's wishes, the government promptly intervened to punish what was largely seen in her province as a case of her family having overstepped their prerogatives and conducting an illegitimate killing. Although many felt that the sentencing of only one family member for the deed was insufficient when the murder appeared to have been a collective undertaking, the court verdict at least signalled that family claims over their women were far from absolute. Allegations concerning Fereshta's adulterous nature resurfaced in the trial, presumably to make her murder seem more justified. The judge rejected this line of argument, and sentenced the designated murderer to 16 years of prison, which must be considered a clear statement that the killing of Fereshta had been a serious offence.

The EVAW law had made forced marriage, whether of an adult woman or underage girl a crime, punishable with medium term imprisonment (i.e. no more than two years). Before that, the 1976 Penal Code also stated that marrying an adult woman against her will was to be punished with a short-term prison sentence. But forced marriage appeared only marginally as a violation in the four cases discussed here. All of them contained instances, sometimes several, of marital unions that were coerced but there were no attempts to prosecute or punish anyone for this. If anything, forced marriage appeared as an unhealthy tradition, not as a punishable transgression. The fate of Fereshta was widely reported as a warning of the risks of forcing one's daughters to marry. Fereshta's family was cast as ignorant of the principles of Islam, which prohibited forced marriage (*estevaj-e ikhbari*).<sup>26</sup> Talking about the case on radio, the chief prosecutor in the province reasoned that it was this ignorance and the failure to put Islam first, which was to blame for the family arranging the marriage against Fereshta's will, in turn leading to dispute and eventually Fereshta's death. In a similar manner, Afghan legal experts speaking in the media about the case blamed the lack of legal awareness and called for workshops, especially in remote districts, to facilitate understanding that could prevent other women from becoming victims in the same way.<sup>27</sup> Reportedly, local mullahs were also referring to the case as an example of how forced marriage was reprehensible.<sup>28</sup>

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<sup>26</sup> Radio Azadi, 19.03.2010.

<sup>27</sup> Mohammad Omar Omarzada, Legal scholar, speaking on Radio Azadi, 19.03.2010

<sup>28</sup> Interview #89.

Thus, even if the EVAW law was in force by the time of Fereshta's marriage, there was no suggestion of prosecuting Fereshta's family for forced marriage. Nor was this ever a possibility in any of the other three cases. This fitted in with an overall pattern in Afghanistan whereby any conflictual aftermath of forced marriage was typically pursued, if at all, through the family courts, where requests for a divorce or an invalidation of the marriage were heard. This meant that forced marriage was generally treated as an issue of civil law, not one involving a criminal act. The only case of criminal prosecution for forced marriage that I encountered was a case from Herat province where the father was accused of 'selling' his four underage daughters to finance his drug addiction. Staff at the AIHRC in Herat told me that they had come across this case and alerted the authorities, who had arrested the father and started to prosecute the case. The head of AIHRC's Herat office stated that the marriage of these four girls had been contrary to Islam:

*According to Islam, when a daughter has not reached majority there are two requirements if the father is to arrange her marriage. There must be no objective of making money, and the father has to exercise kindness. He has the right to give away his daughter, but only if it is with kindness. In this case, the father did not show kindness. And he was a drug addict so he was selling his daughters.<sup>29</sup>*

The question of financial motivation marked a fault line in the discourse on forced marriage; marrying daughters off for overt financial profit amounted to a greater offence than simply marrying them against their will. The latter was sometimes considered as falling within the rightful prerogatives of fathers, who were purported to decide in the best interests of the girl. Marrying of a daughter purely for pecuniary gain, on the other hand, was denounced as a crude and self-interested act. The distinction carried an obvious class dimension, underlining the link between 'honour' and status. Selling a daughter without any pretence was an act reserved for the destitute, something that those better positioned could afford to avoid.<sup>30</sup>

In the three other cases discussed here, *baad* or the prospect of *baad* as a means of reparation featured. In Sarepul, Bashira's uncle Noorullah had agreed to receive a *baad* from the family of the rapist, who was married to his son, even though he was well aware of the consternation with which giving and receiving *baad* was viewed amongst his backers in human rights circles. The brokers of the reconciliation between the aggrieved uncle and MP Payenda's

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<sup>29</sup> Interview # 42.

<sup>30</sup> According to mostly anecdotal reports, large networks for trafficking and selling of women and children for prostitution exist in Afghanistan, both for domestic markets and abroad.

family, senior government officials and political leaders, were also conscious that *baad* was frowned upon in official circles. They had, according to Noorullah, suggested that there should be no mention of *baad* in the document which stipulated the settlement between the families and made a host of leading politicians who signed the document the guarantors of the uncle's life, in return for this future silence about the rape. Instead, there was merely a vague statement to the effect that the families had agreed to strengthen their relations. The *baad* nonetheless took place, although, as will be showed below, the identity of the girl who was given in *baad* meant that it fell short of expectations.

That giving *baad* was not consonant with state law or even Islamic law was widely appreciated. In fact, central governments had, since the time of Abdur Rahman Khan tried to eradicate the practice by explicitly outlawing it. Even the Taliban had, in a short decree on women's rights, made it an offense.<sup>31</sup> Both the Criminal Code and the EVAW law made *baad* a separate crime with stricter punishments than merely forced marriage. Yet while *baad* was not publically condoned, it nevertheless appeared as a standard "solution" to cases where women had been illegitimately appropriated. In the cases of Siddiqa and Nafisa's elopement, *baad* appeared as the immediate restitution of the rights of those who were deemed to have been wronged; the family who had lost a bride. That this was so illustrates the way in which marriage practices to a large extent were understood as transactions between families. This, in turn had a bearing upon the ways in which gender violence was defined.

## **VI. The 'state' as an arena for contestation over resources**

The four cases reveal how incidents of gender violence were routinely translated into questions of male (or family) status. As Abu-Lughod (1986) explains (see chapter 3), honour is a morally coded ideal which indexes social hierarchies (see also Meneley, 1996, 2006). Women in general attain honour i.e. social recognition through modesty and chastity. As dependents of men, their comportment also reflects upon and validates male authority. It follows that those in superior positions have the most to lose by being associated with

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<sup>31</sup> Decree number 104, dated 17.05.1419 H.Q [Islamic lunar year] of the Islamic Emirate of Afghanistan regarding women's rights in society.

compromised women, whether as a consequence of female defiance (such as elopement) or the depredations of other men. Both amount to a challenge to authority.

This is why the question of whose supervision Nafisa was under when she escaped from her father's house to get away from her fiancé and join Amin was so loaded. Reputation and status were at stake. The protracted exchanges over whose guardianship Nafisa had escaped from was essentially about whose authority had been compromised and who had been shown to lack capability and control, even moral worth. The events set in process by Nafisa's elopement also showed how the inability to handle such issues was associated with weakness and inferior aptitude. Had Nafisa's father been a greater, more powerful man, it was argued, he would never have accepted to take the blame for Nafisa's elopement, and to the humiliation of giving another daughter away as *baad*. Instead, he would have launched a direct challenge to Nafisa's fiancé – stating that she had been his responsibility and daring him to kill both Nafisa and Amin.

The subsequent fate of the families involved showed that such incidents had serious ramifications. Two of the families decided to leave the area. Amin's family moved away, and Nafisa's family left for a province in another part of the country, probably hoping to start a new life in an area where the scandal they had been tainted by was unknown. Due to their already weak standing, they had proven themselves unable to deal with the matter in an honourable way, and instead had slipped further down the social hierarchy. In contrast, in Kunduz, Siddiqa's family took a much more resolute approach. They went directly to the co-elooper's family to demand the return of Siddiqa. Soon after, the killing of the couple settled matters once and for all.

The fact that sexual transgressions were understood as matters of male status and authority also potentially made them significant idioms in on going political contests. This was particularly pronounced in the Sarepul case where the rape of Bashira became embroiled in a power struggle between competing factional groups in the province. However, these dynamics were not immediately evident to me. When starting to gather material on the case, I was constantly mindful of the need to proceed with caution. Human rights activists who were familiar with the Sarepul case told me it was extremely complicated, with the government trying to pull all kinds of strings to protect MP Payenda, father of one of the men who had raped Bashira, from being compromised. As I consulted with various people along the way, I gained the impression that Bashira's family, having been intimidated into silence by local

power holders and the government, could be at great risk if they talked to outsiders about it. The unrelated case of the unexplained murder of Diliwar, husband of Sarah, who had been raped by a government -allied commander in another northern province ( see page 47), was still less than a year old. I obviously did not want to arrive in Sarepul and by meeting Bashira's family, or even just asking around about the case, attract the attention of the local authorities and put the family in danger. It seemed that the only responsible thing to do was to wait to go to Sarepul until I could be sure that the family was prepared to meet and discuss the case, and even then, to travel discreetly and not stay too long.

Thus, after a series of reassuring introductions, I went, travelling with my research assistant, Jawad in a local taxi the three and a half hours drive from Mazar-e Sharif and without contacting many people in the provincial capital beforehand. I was somewhat surprised that when we met Bashira's uncle, Sayed Noorullah, he appeared upbeat and even delighted by the opportunity to talk about the case, even though ( upon his suggestion) we were meeting in the provincial council's office for all to see. We sat together for many hours in one of the rooms as he told us about the events that had followed the rape of his niece. He spoke about the constant threats and harassment by government officials that he had experienced following his decision to make a complaint about the rape. Not only was he targeted, but so were his relatives. Fear of losing family members in the end, Noorullah explained, made him decide to give up pursuing the rape charge through government courts and instead agree to a reconciliation with the rapist's family. As part of this settlement, in addition to the *baad*, the uncle received a guarantee that his life would be safe on the condition that he would never talk about the case again. However, the uncle contended that despite the promise, he had wanted to talk to me. I was a researcher and it was important that what had happened to his family should be documented. His fight against injustice and oppression had to be recorded so that future generations could learn from history.

But there were certain cracks in this narrative, and as time passed they were becoming increasingly difficult to ignore. I wondered why, if the case was as sensitive as the uncle claimed, and his position in the province so precarious, he had suggested to meet us at a government office, where his contact with a foreigner would no doubt be detected and raise suspicions that he was breaking his vow not to pursue the case. His acceptance of the *baad* from Payenda's family also sat uneasily with the uncle's story of fighting injustice. Even if the uncle felt too threatened to continue pursuing the case in government courts, and wished to have guarantees for his safety, what was the need for accepting the *baad*, something that

discredited him amongst his liberal supporters in Kabul? <sup>32</sup> Could he not have settled for just the guarantee?

When I returned to Kabul, other fractures appeared. The judge who had presided over the rape case in the primary court in Kabul contradicted Noorullah's assertion that the sentence of the MP's son had been lowered in higher instances of the court system. On the contrary, the sentence of 20 years imprisonment for the MP's son, his bodyguard and their female abettor had been confirmed in the appeal court and finally in the Supreme Court. Details of this had been published in an edition of the *Mizan Gazette*, a Supreme Court newsletter of which I obtained a copy. If the government courts had applied the full force of the law, the local reconciliation and the *baad* made even less sense, as the justice the uncle was calling for already appeared to have been served.

Eventually, through a series of conversations, an alternative version of the events following the rape of Bashira emerged. On important points, this version diverged from the way the case had become known to me through the media, the accounts of the uncle and his backers. Firstly, Bashira's family background was not quite as powerless and poor as had been implied. They hailed from a lineage claiming holy descent. Moreover, members of Bashira's family held important government positions in the province. It was partly through these positions that the family was able to get access to the media, and doubtlessly, mobilize some of their support amongst politicians and officials. Another dimension of the story, which had not featured in the national media coverage, in the calls for justice by human rights officials and activists, or in the depictions of the uncle was the ethnicized politics that quickly became part of the aftermath of the case.

In order to understand how Bashira's rape became enmeshed in Sarepul politics it is necessary to relate some of the local historical background. Sarepul, like most parts of Afghanistan, has a recent history of oft-changing and contested control over territory, state institutions and resources. Pashtun migrants had arrived in Sarepul from the late 19<sup>th</sup> century and onwards (Tapper, 1991) as part of a larger, government supported Pashtun migration to Northern Afghanistan. Backed by the central state, the mainly nomadic Pashtuns seized land and lucrative government posts, establishing themselves as a dominant minority group in much of

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<sup>32</sup> Noorullah lightheartedly recalled how Sima Samar, the head of the Afghan Human rights commission declared that she would never talk to him again should she come to hear that the uncle would pursue a *baad*.

the province, where also groups of Hazaras, Uzbeks, Aymaqs and Arabs were living (Tapper 1991).

The advent of war altered the ethnic balance in the area. As armed resistance formed against the communist government that seized power in Kabul in 1978, mujahedin and pro-government militia groups emerged, and in the North often proved a vehicle for non-Pashtun groups to assert themselves. Arabs, claiming descent of Arab tribes from the time of the original Islamic conquest and previously a marginal group of pastoralists, gained a new position in the province through this route. Four brothers, amongst them Haji Payenda, the MP whose son was to be sentenced for the rape of Bashira, rose to prominence as members of a local self-defence unit mobilized by the Najibullah government. The brothers served under Abdul Rashid Dostum, the Uzbek military strongman who was to emerge as a key regional powerbroker in the decades that followed. With Dostum, the Uzbeks in the Northern region also strengthened their position. Initially working with Najibullah, by 1992 Dostum had, increasingly in defiance to the Pashtun-dominated central government (Guistozzi, 2009) established a regional network consisting of both pro-government militias and mujahedin commanders until he spectacularly defected from the government in 1992 (ibid). This network became the *Junbesh* party, an important political actor in post-2001 Afghanistan and in Sarepul. In the mountainous south of Sarepul, mainly Hazara groups formed armed resistance factions against the communists, and in yet other districts, Tajik-dominated mujahedin emerged. These groups generally aligned with national-level mujahedin parties. In a pattern seen elsewhere in Afghanistan, local rivalries were fed by support from national party formations, which in turn led to a fragmentation of the local political landscape alongside party and ethnic lines. The importance of these fault lines lessened during the Taliban government, although many areas in Sarepul remained completely controlled by the mujahedin. With the overthrow of the Taliban government in 2001, factions rooted in the mujahedin and militia groups of the pre-Taliban period again became dominant actors in Sarepul politics. In sum, the upheavals of the decades of conflict had created a fluid situation where previously enduring political and ethnic hierarchies were constantly up for renegotiation. The post- 2001 period saw the new elites of the jihad-era, and their broader, mostly ethnically defined constituencies, vying for control over government posts, land and influence.

It was this factional competition, some of my informants argued, that had been the driving force in the dynamics of the aftermath of Bashira's rape. In a bid to weaken Haji Payenda, and

by extension, Arab domination, two key groups involved themselves in the case and threw their support behind Bashira's family. One of these groups was local Uzbek power holders belonging to the Junbesh party. Sometime earlier, Payenda had switched his allegiance from Junbesh, the Uzbek dominated party headed by Dostum, who in turn were supporting President Karzai. Instead, Payenda and a number of other Arabs had established their own political group, which eventually supported the opposition candidate, Dr Abdullah, in the 2009 presidential election. The case against Payenda's son was also supported by Hazara groups that wanted to strengthen their position in the province. Bashira was Hazara, and according one of my informants, the case became overstated as a way of unifying them:

*'When the case first came to the media, the Shia people got angry and they united on how their honour had been insulted. They made it a big and very complicated case, in order to unite the Shias, make them one power.'*<sup>33</sup>

In these accounts, Bashira's young uncle Noorullah appeared less than a self-driven campaigner for justice, and more of a figurehead for these discontented groups, having been handpicked as a suitable front-person when Bashira's father, of ill health, could not play that role. The pressure for Payenda to give a *baad*, was not imposed from above, as an attempt by powerful actors to make the case go away. Instead the giving of *baad* had formed an integral demand of the uncle's campaign all along, a demand which, if successful would have placed Payenda on par with his adversaries. Giving a daughter in these circumstances would have signalled that Payenda was not above other groups in the province, that he was a social equal to Bashira's family; a daughter taken had to be compensated with a daughter given. On this account, there was in the end only a partial victory. While the demand had been that Payenda give his own daughter, he successfully refused this. Instead, a daughter of a poor man from Payenda's tribe, reportedly paid by Payenda, was given as a *baad* to Bashira's family. In the opinion of one of my informants, this showed how Payenda remained able to defy obvious attempts to weaken him.<sup>34</sup>

Nonetheless, in versions that emphasize how the aftermath of Bashira's rape became a vehicle for local politics, it was MP Payenda who appeared as the compromised party. Despite spending considerable money to influence the courts he had been unable to prevent his son from feeling the full force of the law. Having been exposed as less than all-powerful in the province, he also lost his parliamentary seat in the next election, in 2010, although this could

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<sup>33</sup> Interview # 81.

<sup>34</sup> Interview # 81.



also have been due to his alliance with the *Jamiat* party, which had a weak position in the province (Embassy of the United States Kabul 2009).

In the subsequent chapters of Sarepul politics, the groups that had supported Bashira's family came to dominate the local government. And in a further reversal of positions, episodes of rape and kidnapping of women now served as focal points of mobilization by factions linked to Hajii Payenda and his brothers – against the now Hazara-dominated provincial administration (Ruttig 2012). It seemed that public protestations against sexual infractions had become a standard part of the political repertoire in Sarepul. In a sense, protests were directed against the impunity afforded by government connections, impunity which was facilitated by access to government office and in the next round of local politics, became the privilege of the new power-holders.

If the unusual persistence of Bashira's family in pursuing the rape case in public could be explained, partly or fully, by the interest of local groups in using the case to challenge the political position of Payenda and his allies, this in turn serve as a reminder that “the state”, as many scholar have reminded us is a claim, a construct, not a thing or a fact. Bashira's uncle might have called for government action in a sense that suggested that there existed a unitary, independent Afghan “state” capable of autonomous action in one direction or the other. Likewise, other actors invoked similar images when calling for the state's responsibility to protect women against family abuses, or alternatively, to uphold kinship control over them.

But these contending notions of state responsibility and justice are disputes over internal boundaries and personhood, the outcome of which has consequences for authority over domains and persons. They should not lead us to believe that there is such thing as a unitary, coherent state; ‘a person writ large’ (Mitchell 1991: 83) a judge-like character insulated from society as a whole. As Mitchell argues; the appearance of the state as a discreet and relatively autonomous social institution is itself a reification that is constituted through everyday social practices. In reality, claims to statehood and the emergence of government apparatuses; armies, bureaucracies are always intertwined with struggles over resources and power.

This means that demands and counter-demands for state action , and claims to act on behalf of “the state” must be situated in the local political economy – in other words in conflicts between groups and classes over resources and influence. As the history of Sarepul clearly illustrates, access to government positions – and the associated ability to call upon bureaucratic and military enforcement mechanisms – have served as a tool for appropriation

and accumulation. The primary fault line then, is not necessarily between kinship (or families) and the government ( i.e between “society” and the “state”); it can also be between competing factions, whose success in controlling and accessing state power has waxed and waned.

From this perspective, it looks as if the Sarepul case– instead of one man’s thwarted campaign to secure a government reaction against the abuses visited upon his family – was locally understood, or at least seized upon, as an infraction against a larger collective by a rival group. This violation had to be reacted against in a manner that asserted the position of Payenda’s rivals; a reaction that showed that Payenda and his group were not above, but of equal standing to other groups, and simultaneously could undermine his grip on power. The “state” here features as a vehicle for inter-group competition, a competition where authority over women serves as a marker of position and status (see chapter 3). In other words, the ongoing renegotiation of power hierarchies in Sarepul – in which official positions constitute an important resource, and which in the last decades had become increasingly open-ended as war offered novel paths of assertion to previously marginal groups – took place, in part, through public contestations over claims over women. Government courts and the media provided novel and additional arenas for such claims, which should be understood as assertions of position and status, expressed through idioms of honour. But in these latter arenas, claims were framed somewhat differently. When Bashira’s uncle appeared on national TV he did not ask President Karzai to arrange for a *baad* from Payenda’s family (such a demand could not have been expressed nor granted openly) but for the government to see that the rapists would feel the full force of the law. The rape was still spoken of as a violation of family honour, but demands of government action was framed in the language of justice and punishment.

It was this kind of language that led many outsiders and national actors to believe that something novel was happening; that people were now bravely speaking out against the violations visited upon their daughters by government allies, breaking a taboo in a desperate bid for some kind of reparation. Admittedly, the Bashira case and other episodes from Sarepul *were* novel in the way the victims’ families were willing to openly mobilize national public opinion for their case. Still, the exceptional intensity with which public redress was sought must be understood as an extension of factional political conflict, played out in part in the public arenas of the media and the courts, rather than an attempt by families to rearticulate government obligations to its (male) citizens.

I believe that the Sarepul case also illustrates the pitfalls of regarding the language of honour as somehow integral to a non-state logic of “kinship” society. According to the evolutionary perspectives often applied to Afghanistan, (see page 16 ) honour ( *namus* ) is a “tribal” value, consonant with a pre-state social system based on kinship, egalitarianism, autonomy and the strict seclusion of women. If such idioms make an appearance in state arenas, they are typically considered spillovers from the tribal system where they properly belong, and are assumed to be eventually eradicated by the modernizing touch of the state.

The Sarepul case unsettles such binaries particularly well. First of all, as this and the other cases in this chapter show, intensified state regulation of gender violence and relations do not necessarily lead to a more equal status for women. On the contrary, government regulation might instead affirm family control over female bodies and validate notions of honour by lenient punishments for killings of female family members.<sup>35</sup> But moreover; honour, as a vocabulary of power and boundary-marking, as a way of articulating violations and entitlements, can equally be employed in struggles *over* state power. It is often those with a degree of influence and access to the state who can utilize official positions and public arenas to pursue gender violations – whether as standalone issue, or as a component of larger political projects—as was the case in Sarepul.

## VII. Conclusions

The trajectories of the cases discussed here suggest that as incidents of gender violence became public matters, they were predominantly articulated as violations of family and male “honour”. The gender relations that the Afghan government, and other public institutions were called upon to sanction were often of a kind where kinship has recognized authority over women and in particular female sexuality. This pattern resonates with an oft-observed tendency in Middle Eastern and Muslim majority countries towards the ‘sanctification of kinship’ in legal frameworks (Joseph 2000, see also Charrad 2001).

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<sup>35</sup> KOGACIOGLU, D. 2004. The Tradition Effect: Framing Honor Crimes in Turkey *Differences*, 15, 118-151 makes a similar argument for Turkey, where she points out that the legal and institutional accommodation of ‘honor killings’ makes questionable these same institutions presentation of them as acts of tradition.

At the same time, public acknowledgment of these claims was by no means guaranteed and individual cases often took the form of a tug of war, with highly unpredictable outcomes. Such uncertainty was particularly evident in the ways in which government dealt with “runaway” girls – routinely arresting them on the behest of their families, but not necessarily directly paying heed to family claims over women in court. However, even if women were not returned to their families by the direct order of courts, legal and social practices nonetheless often combined to produce this effect anyway. As the case of Fereshta showed, there was an underlying stigma linked to women travelling and living alone. This stigma made it conceivable for authorities to arrest Fereshta upon her family’s request and later, to broker an agreement to send her to live with her family.

What these ‘micro-struggles’ over the definitions of gender violence, and over the right (or obligation) to adjudicate and avenge such incidents also tell us is how conjunctural legal regimes are. Although cloaked in assertions of indisputable and unambiguous truth, they emerge out of context-specific alliances and accommodations and are embedded in political relations. For instance the case in Kunduz echoes Siddique’s warning against ‘timeless, decontextualized Islam’ which ‘ does not bring into view the complex and historically specific ways in which national and international vectors of Islamization articulate with politically economy and rural structures of power ’ (Siddiqi 2011: 82). As the events surrounding the stoning suggested, local patriarchs might find an ally in military actors contending for territorial control, whereas to the latter spectacular and brutal public displays of “Islamic justice” were parts of an active project to demonstrate power. At the same time, religion could be invoked to limit the power of kinship and husbands over women by appealing to the need to eradicate harmful traditions contrary to Islam. Forced marriage was typically framed in this way. In other words, even if gender violence was often defined in ways that subordinated women to male guardians, this must be considered an active accomplishment, needing maintenance and reinforcement through the forging of new articulations and the upholding of old ones.

Other than boundary making and gender relations, there were also other dimensions to the dynamics through which cases of gender violence, or as they were often articulated; violations of honour, became public issues. The case from Sarepul showed that what could appear to be a question of government obligations to upheld citizen’s honour was perhaps better understood as a struggle for power between local groups. Appreciating this requires a shift in

our perspective on the state itself; the government was not acted upon as a coherent structure but as a vehicle of factional struggle. Through this lens, gender violence as a governance issue ( i.e. a site of government action and intervention) was but one chapter in an ongoing struggle over power and resources.

## Conclusions: protection at a price?

A few days before I started to write these concluding comments, another case of sexual abuse reached Afghan TV screens and the international press. Lal Bibi, an 18-year old nomad woman from the province of Kunduz came forward in Afghan media recounting how, on the 17th of May 2012, she was seized by men linked to the Afghan Local Police. After a few days, the New York Times wrote a story about the case, reporting that she had been held captive for five days and sexually assaulted, as revenge for her cousin's elopement with a woman of one of the kidnappers' family. Lal Bibi's family declared to journalists that unless justice was done they would have no option but to kill her.

The episode was quickly denounced as yet another case of abuse visited upon the Afghan people by the controversial Afghan Local Police (ALP) Established by the US military, the ALP programme involved establishing local police units, trained by US special forces, who would serve as a first line of defence against Taliban insurgents. The programme had been under heavy criticism since its inception, with opponents arguing that it was a short term measure adding to the country's problems with armed, semi-formal groups. After a few days, President Karzai, who had been ambiguous, if not outright opposed, to the ALP all along, personally intervened in the controversy over the kidnapping by announcing that the entire ALP unit of the accused rapist should be disarmed. But back in Kunduz, the man accused of the rape protested that no such thing had taken place. He argued that there had been an agreement of *baad*, and that a mullah had married Lal Bibi to him just before intercourse, and 'once the marriage contract is done, any sexual intercourse is not considered rape,' (Rubin 2012) However, in today's Afghanistan, this version of events did not necessarily exonerate him from having committed a crime. Others contended that forced marriage was also an offense according to Afghan law (Ibid.) Moreover, his attempt to justify his actions with reference to a framework of *baad* even implicated others. A colleague who happened to be in Kunduz on fieldwork told me upon his return that the elders who sanctioned the kidnapping as an appropriate redress for the affront to the honour of the eloped girl's father, now found themselves being pursued for crimes against the EVAW law on the grounds that they had facilitated a *baad*. However a month later, no one had been arrested in connection to the incident.

While it is not my intention to probe more deeply into this case, I cite it as a reminder of the stakes involved in discourses about gender violence; in defining acts of violence, deciding whose jurisdiction they belong to, and placing violence in broader political narratives and moral frameworks. The aftermath of Lal Bibi's rape showed how unstable and contested this field was in Afghanistan, with categories of victims and definitions of violations constantly up for negotiation. The starting point for this thesis has been that such contestations over gender violence offer a window into shifting relations of gender, power and governance. I have set out to explore concrete processes through which definitions of gender violence are articulated and renegotiated, and sovereign domains and jurisdiction claimed, affirmed or disputed.

In Chapter 1 I laid out the analytical departure points of the thesis. I identified as fundamental what counts as violence or violations, demonstrating that definitions of gender violence in a given context reveal much about gender hierarchies. In turn, I suggested that sovereignty— the claim to exercise autonomous, exclusive control over the lives, death and conditions of existence of others (Comaroff and Comaroff, 2006) is a useful concept for appreciating the construction of a gendered public/private dichotomy in which certain abuses of women are considered as family prerogatives. I then set out to show how shifting definitions, and regulatory practices of gender violence can also illuminate broader fields of power. Drawing upon literature on the trajectories of state formation and gender in the Middle East, I contended that the way in which governments seek to regulate gender violence and therefore family and kinship relations is contingent upon the power base of the government and the political strength of feminist movements. A perspective attending to specific historical forms of interventions into gender violence, I argued, must also accommodate the possibility of temporal and multi-scalar sovereign orders, at the global and local level. Finally, I pointed to the analytics of governmental assemblages in order to appreciate what happens when gender violence is made the target of routinized bureaucratic interventions and entangled in the hierarchies of international aid machineries.

In Chapter 2, I elaborated on the setting in which my research took place. I described a field defined above all by precariousness and unpredictability, caused not only by the widespread violence across the country but also by the constant renegotiation of political, institutional and moral frameworks. I explained how this fluidity informed my methodological framework, and how it structured my data collection. Chapter 3 provided an account of the historical and social context in which contestations over violence against women in Afghanistan were unfolding. I demonstrated how ideals of gender segregation and kinship authority over women

– in particular the control of their sexuality – rendered female seclusion a marker of status, articulated through the idiom of honour. Honour could thus serve to rank both men and women, and as a language through which both power and violations are expressed. In order to contextualize struggles over state responsibilities and gender violence in contemporary Afghanistan, I also provided an overview of the history of government intervention in this field, and of the emergence of the legal system that such interventions depended upon.

These three chapters set the stage for the empirical sections of the thesis. I started with a discussion on the law on Elimination of Violence Against Women, the EVAW law (chapter 4). Derived, in parts, from the global VAW discourse, the EVAW law defined violence against women in terms of violations of their bodily integrity (e.g. rape, forced marriage, beating) as well as their civil rights (e.g. deprivation of inheritance, preventing access to education, work and healthcare). As the law was debated in parliament there was a clear tendency towards reinstating some of the authority of fathers and husbands over their daughters and wives. For instance, fathers were exempted for punishment in cases of forced marriage, since it was argued that they were better placed to define their underage daughter's interest. But there were also attempts to ensure women their part of the deal; the non-payment of wives' maintenance was inserted as a form of violence against women. Had the process in parliament been completed and the EVAW law ratified there, it is likely that the law would have defined gender violence in ways that both constituted women as independent legal persons, whose bodily integrity and sexual autonomy was inviolable, and as gendered beings who, by virtue of being women, could call upon certain male obligations such as maintenance. The latter amounted to a public regulation of patriarchy, curbing male and family excesses and guaranteeing women their part of the Afghan 'patriarchal bargain' ( Kandiyoti 1988).

But perhaps of more significance than the content of the EVAW law were the processes and channels through which it was initiated, developed and implemented. The promotion of the EVAW law took place through a transnational assemblage in which global gender expertise and apparatuses intersected with the personalized and patrimonial politics of local women's activism. This form of politics was reinforced by the resources flowing through the aid system, reflecting the link between development brokerage and patron-client systems pointed out by Olivier de Sardan (Olivier de Sardan 2005: 174). Overall, the force of the EVAW law assemblage was paradoxically both enabled and constrained by its dependence on the diplomatic and financial leverage of NATO countries.



Having explored battles unfolding on Afghanistan's legal terrain in chapter 5 I turned to a key part of the institutional infrastructure that had been erected through very similar dynamics as the ERAW law. Here again the contradiction between transnational support as a resource and as a constraint revealed itself. Women's shelters, financed through foreign aid and run by NGOs were attempted nationalized by the Afghan government, amidst a growing populist backlash depicting them as foreign plots against family, religion and morality. The controversies laid out in chapter 5 provided a classic example of how women serve as a marker for national sovereignty and religious purity. The specific forms that this discourse took in post-2001 Afghanistan was overdetermined by the constant tension between three key aspects of the post-2001 order; foreign military operations, the rehabilitation of the mujahedin and external attempts to promote Afghan women's rights. In a setting where many powerholders evidently owed much of their current positions to Western funds and armed support, taking a conservative position on women's rights became a valuable way of demonstrating one's nationalist and Islamic credentials.

I started this research by posing the question of whether gender violence was becoming a governance issue in Afghanistan. Taking my cue from literature on expanding state regulation over family and kinship, I wondered what an apparent shift where the state was to assume larger responsibility for punishing acts of gender violence could mean for gender relations and state power. However, as became evident fairly quickly, I could also have asked if gender violence in Afghanistan was becoming a *global* governance issue. The thesis has drawn upon insights of literature on global governmentality and transnational gender activism to demonstrate how this has indeed been the case. The promotion and implementation of the ERAW law and the institution of shelters were operating through transnationally constituted assemblages, and only to a limited extent routed through the Afghan state. These efforts were certainly not driven by the centralizing impulses of an Afghan ruler seeking to expand government power by drawing women into the circle of government justice, thereby wresting away the autonomy of their male relatives. In fact president Karzai's strategy on violence against women was much more opportunistic and appeared primarily informed by his efforts to create and maintain personalistic alliances. As one activist suggested to me, unlike King Amanullah or the PDPA, 'Karzai is not personally committed to women's rights, he is just committed to the international funding that comes with it.'<sup>36</sup> Neither were there any signs that he attempted to use government courts to achieve tighter state regulation of family and

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<sup>36</sup> Interview # 145.

kinship in order to centralize power. As the Sarepul case had showed, government response to issues such as rape was reactive and entangled in patrimonial politics. Whether by effect or intent, the EVAW law and the shelters were instead constructing a globalized zone of protection for Afghan women, much dependent on external funds and political pressure.

But global relations of governance were multifarious. In chapter 6 I probed the emergence of an alternative configuration of justice and sovereignty, demonstrating that global, and in particular Western, interventions in Afghanistan were heterogeneous and even contradictory. My research into this was prompted by the incredulous complaints of an Afghan human rights official, who protested what she saw as a problematic Western othering of Afghans, denying them access to formal justice and rights. In contrast to the universalizing templates of the EVAW law, the starting point for the interventions of this informal justice assemblage was to be “Afghan reality”. Yet, this reality still needed to be modified and validated by foreign-educated experts. The vision of justice presented by these experts were one in which shuras and jirgas would function as a kind of enlightened tradition, devoid of power relations and hierarchies, cleansed of their excesses by the training and monitoring programmes carried out by NGOs. State structures were made marginal in this alternative sovereign configuration. In fact, it can be argued that in the imagery of the informal justice assemblage, there no longer featured an Afghan state. Instead the local was directly connected to the international, but, as the chapter showed, in ways that were deeply asymmetrical. Despite assertions to the contrary, rather than local actors it was expatriate expertise and Western militaries that reigned supreme through this assemblage.

The final chapter of the thesis offered a glimpse of the workings of the “institutions” that were the subject of such much controversy; informal justice processes. Here I examined a small number of “micro-struggles” over gender violence, namely the efforts to delineate violations, responsibility and retribution in four individual cases. The cases suggested that, despite the assertions of experts who argued that *baad* was becoming rare, giving women in compensation was a routine solution to transgressions. However, the chapter also demonstrated that gender ideologies where women were subsumed under family sovereignty operated across the social field and were not in any sense reducible to “customary” structures or worlds. I problematized the notions of total, determinate logics further by showing how discourses of honour can function as a vocabulary of demands and assertions in struggles over access to state power.

Taken together, the chapters show that the ways in which gender violence is defined, regulated and adjudicated is not in any way pre-determined, but arrived at through the negotiations, accommodations and arguments unfolding at specific times and places. Rather than battles between the discrete orders of state, kinship or religion, these were open-ended, contingent contestations. In turn, this historicised approach places great emphasis on *practices* of political struggle. For one, if gender orders where women are rendered legal minors over whom kin and husbands hold certain rights are not integral to a particular religion, culture or social system, it follows that a great deal hinges on the political labour that goes into either maintaining or challenging such constructions. In this thesis I have probed into the resources various actors had at their disposal when doing such work and the power structures that shaped the terrain on which they were manoeuvring. In chapter 4 and 7 I showed that for Afghan citizens Islam constituted a paramount discursive resource and boundary. To cross this boundary, by calling for a secular legal framework for instance was politically impossible. But within the parameters of Islam there were competing ways of envisioning women's positions, and religion, as elsewhere, did not appear in a 'pure' form but was interwoven with ideologies of conservative nationalism ( in the articulation of the jihadis) or modernist enlightenment ( in the articulation of Afghan feminists and liberal religious scholars). The dominant position of the jihadi version was based on a number of contingent factors, amongst which were their powers of intimidation, their ability to mobilize around the need for national and religious assertion in the midst of a political order underwritten by Western infidels, and their appeal to patriarchal sentiments. In international circles a common debate was whether Afghanistan and Afghans could justifiably be aspiring to "Western" models of statehood, legal systems and rights, or whether the country was to adhere to its allegedly unique templates of political organization, personhood and justice. As I showed in chapter 6, the response to these questions vacillated in tandem with larger political shifts, underlying again the connection between the discursive work done by individuals and the larger dynamics that make them plausible, compelling or unconvincing.

I have shown that a central theme running through contestations regarding the definitions of, interventions into and protective measures against violence against women was the degree to which kin and particular male relatives and husbands could claim legitimate interest in, and authority over, female sexuality. Runaway girls, safe houses for women, and government-mandated punishments for forced marriage or 'honour killings' all potentially challenged or renegotiated social practices and assertions that subordinated women to their families.

However there were few attempts to directly confront gender ideologies that placed an absolute premium on female propriety. Discussions around forced marriage or the shelters emphasised women's right to choose their own husbands and to be free of family violence, but they did not venture into the sensitive terrain of attempting to dethrone the imperative of female chastity. Thus, the notion of a distinction between 'good' and 'bad' women, between those deserving protection and those beyond the pale of respectability was not disrupted. Perhaps, for women who only a decade earlier had been banned from the public domain altogether, and for whom public presence was still extremely tenuous, this was far too risky a topic. Most already felt the need to carefully maintain a virtuous public persona and to enter into a debate that would put them in solidarity with non-chaste women would almost certainly serve to taint them as 'bad women' or outcasts. However, the implications of this unwillingness to enter into the terrain of sexuality were clearly illustrated in the different response in two cases of abused women in the winter of 2011. 15 year old Sahar Gul, who was found in the basement of her family-in law starved, beaten and severely abused, allegedly for refusing to get into prostitution on her in laws' and husband's request, became to many Afghans a symbol of the total indifference by their government to women's suffering. The press reported that Sahar Gul had already attempted to escape by going to a neighbour's house, but was sent back by local authorities. The outpour of sympathy to Sahar Gul and the anger directed towards Afghan authorities was not in evidence in another case, with a much more ambiguous victim. Gulnaz plight had become known after a dispute over a documentary film in which she took part. The European Union, having commissioned a film about women in jail, blocked its release when it found the women's security to be in danger. The story was leaked to the press and Gulnaz's fate, who was serving 12 years in jail for adultery after falling pregnant as a consequence of being raped by a married cousin, became publically known. While international press coverage was at similar levels to that of Sahar Gul, Gulnaz's case was less, if at all, an issue in Afghanistan. An element of this difference was no doubt related to the varying degree of virtuousness that these two young girls could be said to possess. Sahar Gul was reported to have been refusing her family in laws attempts to prostitute her, the abuse at their hand the heavy price she had to pay for her defiance. Gulnaz's virtue, on the other hand was more open to question. Having only reported the rape a few months after it had happened and with no tangible proof of credible resistance, her circumstances invoked much less open sympathy.

My argument that the forms that formal sanctions of gender relations take are not preordained by religion, culture, or other fixed societal attributes, but contingent on situated politics resonates with academic literature on gender in the Middle East and beyond. Research on women and legal protection in the Middle East has documented the importance of the state's local power bases (Kandiyoti 1991; Molyneux 1995; Joseph 2000; Charrad 2001) for how women's rights are enshrined and enforced in government frameworks (see chapter 1). Furthermore, the thesis underlies the importance of zooming out beyond national borders when mapping the political constituencies shaping government policies. By pointing to the many and sometimes contradictory ways in which international pressure and funding shaped interventions into gender violence, I have highlighted how transnational coalitions and political agendas can be as important for outcomes as national constituencies. Importantly, 'the global' must not be understood singular force or project, but as shifting and competing agendas and alliances (Kim-Puri 2005). An important part of this historicised perspective has been to unsettle the national state as the ultimate, self-contained unit of reference and guarantor of claims. As Kim-Puri note, the theorisation of the state in line with recent insights understanding 'it' as a contingent set of institutions and relations (as opposed to a monolithic structure) has largely been absent in feminist sociology (Kim-Puri 2005: 144). Moreover, transnational feminist studies, while attending to the asymmetries and inequalities produced by the flows of global capital and geopolitics, have not explored in detail how 'the state' has been reconfigured as a consequence of such flows.

The thesis sets up an analytical frame that sees state institutions as immersed in, and partly expressive of transnational processes. I do this by drawing upon the work of Sassen and others; demonstrating how the very notion of 'the Afghan state', as a nationally contained, unitary, sovereign body makes little sense in the context of interventions into gender violence in Afghanistan. I have showed, for instance, how in the case of the EVAW law, certain state capabilities were reoriented towards more global projects (Sassen 2006). National institutions—courts, prosecutors and legislatures became part of a globalized sovereign regime where Afghan women's security were made a global concern and ultimately guaranteed by external funds and pressure. In other words, the Afghan state was denationalised, in the sense of being reassembled as a vehicle for the operation of global sovereign claims. However, this was never a complete process, nor was the EVAW law assemblage the only form of transnationally-constituted sovereign claim. As I showed in chapter 6, sections of the 'international community' in fact attempted to partially dismantle Afghan state institutions,

rather than working through them. There was also a significant difference between the more technocratic and more international coalition forming around the ERAW law and the more directly geopolitical agendas of NATO military victory being mobilised around the shelters. If, as Lisa Hajjar and others argue, struggles over women's rights are also struggles over authority; if increased regulation of gender violence is also about expanding power, this thesis underlines the need to be open-minded about exactly what forms of authority and power are being expanded. We cannot meaningfully limit ourselves to predetermined templates (such as the state, or 'global governance'). Instead we must map and dissect the actual constellations (or assemblages) that in actual practice, define and adjudicate gender violence.

The overall picture that emerges from subjecting the landscape of gender and violence in post 2001 Afghanistan to such a survey is one of fragmentation and partial-ness. To say nothing of the shrinking control exercised over territory within Afghanistan's borders by either government officials or international military and other actors: Even within the shrinking space that they operated in, there was no singular policy, institution or sovereign power. The political and legal orders enforcing claims and counterclaims, the moral universes that gender relations were inserted into and the bureaucratic machineries through which problems were delineated and remedied were multiple and evolving, appearing in historically specific configurations. Afghanistan at the turn of the first decade of the new millennium revealed a thin but not inconsequential constellation of women's activists, progressive justice officials and diplomats, boosted by international funding and alliances. Sometimes entangled in orientalist tropes of 'saving Afghan women' its reach was compromised by its top down mode, but also by the dynamics of patronage politics and the war that was engulfing most of the country. The warring parties also launched their own attempts at rule through justice; the Taliban insurgents with their ostensibly pure Sharia and the foreign military with their experiments in tribal and traditional governance. Individual cases revealed how, at the same time, arenas such as government courts and the media became launching pads for factional struggles unfolding through idioms of honour.

From the perspective of feminist politics, this fragmentation appeared both as an opportunity and a problem. It enabled forms of intervention that were somewhat autonomous from the conservative gender ideologies espoused by important power-holders, but at the same time these were both limited in reach and dependent on problematic alliances. I would suggest that in many ways, women and feminists were facing the choice of two models of protection. Protection, as a number of feminist writers have pointed out is a hierarchical, often gendered

concept, entailing a bargain of material and physical protection against loyalty, propriety and subordination (Kandiyoti 1988; Kapur 2002; Young 2003; Miller 2004). Familial, national and transnational bargains of protection in return for ‘propriety’ should be placed in the same analytical frame; all entail demands for loyalty, dependence and submission. The thesis has showed how protection, whether extended to Afghan women by male guardians, by the government courts or by the shelters routinely came with demands to conform to certain normative ideals. Exactly what these ideals comprised was somewhat contentious – women could be deemed unworthy of protection (or deserving of violent punishment) for defying husbands’ authority, for unauthorized public forays or for being in the company of unrelated men, although sexual indiscretions were a fairly agreed upon disqualifier. In other words, and as many Afghan feminists complained, women were asked to renounce their autonomy, sexually and otherwise, in return for protection.

But there was also a price to be paid for the protection afforded by the laws and institutions that in parts were realized through transnational actors. The price for the ERAW law was to bypass the parliamentary process and thus the opportunity for the politics of women’s rights to be anchored in broader local constituencies. Instead the law was being promoted through informal Kabul-based networks, reinforcing a political mode bearing more resemblance to court politics, than to any kind of broad-based women’s movement. This made gains dependent on good relations with the presidential palace, which in turn differentiated between women politically affiliated with the executive and those closer to the opposition. In addition to a tenuous local anchoring there was also another cost to transnationally derived protection. The NGOs running the shelters, and the transnational alliances they were part of, often mobilized orientalist tropes of saving Afghan women in a way that rendered the latter dependent on salvation by NATO. In this sense, renegotiating one hierarchy often meant getting entangled in another. The shelters, while out of familial and government supervision, became beholden to Western good will, and even military force.

Yet to what extent would it be realistic to expect Afghan women to negotiate a position independent from all of these sets of relations? There is a danger that the notion of ‘pure’ or autonomous of women’s movements becomes an ideal that holds practical feminist gains hostage (Roy 2011). Understanding definitions of and jurisdiction over gender violence as forged out of historicized struggles also bring into view that possibilities mostly comes attached with some accommodations and trade-offs. For instance, the alternative to having the ERAW law as a presidential decree was a modified version in parliament – where it looked

fated to become subject to problematic amendments, or even to be rejected altogether. To many of the supporters of the EVAW law, the opportunity to have, for the first time in history, a law that directly addressed abuses against Afghan women was too important to let pass, even if the way it was obtained was far from perfect. Many of them saw no prospects or time to engage in broader mobilisation and coalition building. Although the victory of getting the EVAW law decreed seemed to bring with it some kind of external dependence, as many Afghan feminist pointed out, the price of getting “protection” by one’s family or husband could also be very high. And so could submitting to the demands of government and their conservative constituencies, as the attempts to establish a screening regime of the shelters testified to.

Perhaps the uncomfortable truth is that there is no such thing as total autonomy; all guarantees have to be negotiated with someone. Afghanistan during the first decade after the 2001 invasion seems like a particular stark reminder of this. Carefully laying out the nature and background of such compromises, which is what this thesis has attempted to do, is therefore not the same as condemning those who make them. It must also be kept in mind that the terms of these kind bargains are never set in stone: It is too early to say what will be the longer time legacy of the struggles over gender violence in Afghanistan during the last decade. Maybe, as many women rights advocates hope for, the infrastructure erected with international support will gradually consolidate and expand, slowly washing away the significance of the compromises and external dependence that brought it into being. Time will tell.



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## ANNEX 1: List of interviews

Many of my informants did not want to be cited with full name, and are listed with background information only. Some also preferred to remain completely anonymous, and these I have given generic titles such as 'local man'. This was particularly the case with those interviewed in connection with events discussed in chapter 7, and those interviewed outside of the cities of Kabul and Herat. \* signifies that I was not present at an the interview.

1. International staff member, Human Rights, UNAMA	31.07.09, 10.10.09, Kabul
2. Staff member, Human Rights unit, UNAMA	31.07.09, Kabul
3. International staff member, UNIFEM	28.08.09, 04.10.09 Kabul
4. Staff member, Human Rights Central Office, UNAMA	06.08.09, 30.03.10, Kabul
5. Staff member, Central Office, UNAMA	06.08.09, Kabul
6. Staff member, Rights and Democracy	12.08.09, Kabul
7. Abbas Nojam, MP	31.09.09, Kabul
8. International staff member, Rule of Law program, USAID	02.10.09, Kabul
9. Sippi Azarbajani-Moghadam, independent consultant	04.10.09, Kabul
10. Robert Peszkowski, Swedish Embassy	05.10.09, 07.10.09 Kabul
11. Stephanie McPhail , Rule of Law unit, UNAMA	06.10.09, Kabul
12. Aysu Shakir, EUSR/Delegation of the European Union	08.10.09, Kabul
13. Tahera Mirzad, MP	08.10.09, Kabul
14. Michael Hartman, UNODC	09.10.09, Kabul
15. Agnieszka Klonowiecka-Milart, UNODC	09.10.09, Kabul
16. Dr Soraya Sobreng, AIHRC	11.10.09, 03.06.10, 17.05.12, Kabul
17. Fauzia Koofi, MP	13.10.09, Kabul
18. Natasha Latiff, GTZ	15.10.09, Kabul
19. Qadria Yazanpardast, MP	17.10.09, Kabul
20. Sabrina Saqeb, MP	17.10.09, Kabul
21. Shukria Barakzai, MP	31.10.09, Kabul
22. Fouz Abdel Hadi CANADEM/ Ministry of Justice	12.11.09, Kabul
23. Staff member UNDP select	15.11.09, Kabul
24. Staff member, Violence against Women Unit, AGO	16.11.09, Kabul
25. Abdullah Aziz, Supreme Court Justice, civil divisions	07.12.09, Kabul
26. Qarizada, president, Afghan Independent Bar Association	08.12.09, Kabul
27. Zakiya and Nabila, parliamentary women's committee	09.12.09, Kabul
28. David Izafidar Political Affairs section, UNAMA	10.12.09, Kabul
29. Najia Zarwari, UNIFEM	13.12.09, Kabul
30. Afzal Nooristani, Legal Aid Organization of Afghanistan	14.12.09, Kabul
31. Abdul Subhan Misbah, Legal Aid Organization of Afghanistan	14.12.09 20.10.10, Kabul
32. Abdul Masood Khorami, Legal Aid Organization of Afghanistan	14.12.09, Kabul
33. Shamshullah Ahmedzai, Manager of Kabul regional office, AIHRC	13.01.10, Kabul
34. Qazi Nazir Ahmed Hanafi, MP	17.01.10, Kabul
35. Ataullah Ludin, MP/Hizb-e Islami	18.01.10, Kabul

36. Habib Sharifi, LAOA	20.01.10, Kabul
37. Shah Gul, LAOA	20.01.10, Kabul
38. Halim, head of Taqnin	21.01.10, Kabul
39. Suraya Pakzad, Voice of Women Organization	23.01.10, Herat
40. Abdul Kabir Salehi Baqi, Norwegian Refuge Council	24.01.10, Herat
41. Roberto Vila-Sexto, Norwegian Refuge Council	24.01.10, Herat
42. Rahimi, head of AIHRC, Herat	24.01.10, Herat
43. Head of legal department, DOWA Herat	25.01.10, Herat
44. Jamila Khosvari, women's council Herat	25.01.10 Herat
45. Maria Bashir, Chief Prosecutor	26.01.10, Herat
46. Zalmay , head of VAW unit AGO Herat	26.01.10, Herat
47. Head of Juvenile detention center, Herat	28.01.10, Herat
48. James Nunan, Rule of law section, UNAMA Herat	30.01.10, Herat
49. Seynabou Dia Human rights section, UNAMA Herat	30.01.10, Herat
50. Tahera Popal , Human rights section, UNAMA Herat	30.01.10, Herat
51. Simin, legal counsellor, Norwegian Refuge Council	31.01.10, Herat
52. Fourasan, legal counsellor, Norwegian Refuge Council	31.01.10, Herat
53. Sedina, legal advisor	31.01.10, Herat
54. Head of DOWA, Herat	01.02.10, Herat
55. Lal Gul, founder and director. AHRO	03.02.10, Kabul
56. Shahla Farida, lecturer, Kabul University	08.02.10, Kabul
57. Huma Alizoi, judge, juvenile court	08.02.10, Kabul
58. Alhaj Abdul Qayum, Chief Prosecutor	15.02.10, Jalalabad*
59. Qari Barial Danesh, Head of Legal Dept at DOWA	15.02.10, Jalalabad*
60. Sheela Barbari, head of DOWA, jalalabad.	15.02.10, Jalalabad*
61. Qazi Zabihullah, Head of Primary Juvenile Court	16.02.10, Jalalabad*
62. Shila Babori, Head of DOWA	16.02.10, Jalalabad*
63. Wazhma Safi, AIHRC Nangahar	16.02.10, Jalalabad*
64. Lailuma, UNIFEM referral center	17.02.10, Jalalabad
65. Dr. Hamdullah, Head of Da qanoon ghukhtonky	18.02.10 Jalalabad
66. Michael Schultz, Rule of law unit, UNAMA Jalalabad	18.02.10, Jalalabad
67. Sandy Feinzig, JSSP	25.02.10, 31.05.10 Kabul
68. Noah Coburn, USIP	04.03.10, 11.05.11 Kabul,
69. Shinkhai Karokheil, MP	14.03.10, 27.03.12, Kabul
70. Qazi Fauzia Amini, MOWA	14.03.10, 17.05.12 Kabul*
71. Gulalai Noor Safai, MP	15.03.10, Kabul
72. Fahimi, MP	25.03.10, Kabul
73. Noor Rahman; Institute for War and Peace Reporting	27.03.10, Kabul
74. Phyllis Cox, Global Rights	01.04.10, Kabul
75. Radio journalist, Mazar-e Sharif	05.04.12, Mazar-e Sharif
76. Sayed Noorullah	06.04.12, Sarepul
77. Political leader	06.04.12, Sarepul
78. Provincial council members,	06.04.12, Sarepul
79. Majifirat; AHRO	07.04.12, Jowjan
80. International staff member , UNAMA human rights, Mazar-Sharif, 07.04.10, Mazar-e Sharif	
81. Staff member, UNAMA Mazar-e Sharif	08.04.12, Mazar-e Sharif
82. Mohammad Eshaq Faizi, Global Rights	15.04.10, Kabul
83. Staff member, Central Office, Human Rights Section UNAMA	16.04.10, Kabul

84. Mohammad Ibrahim Qasemi, MP	18.04.10, Kabul
85. Religious leader, central Afghanistan	19.04.10, Kabul
86. Hanif Hangan, TV journalist	18.04.10, Kabul
87. Gulalai Karimi, MOWA	22.04.10, Kabul
88. Colonel Mohammad Mobin Rasooli, Parwan central jail	23.05.10, Charikar*
89. Maria Samimi , Parwan shelter	23.05.10, Charikar*
90. Head of DOWA; Parwan	30.05.10, Charikar
91. Staff member, DOWA Parwan	30.05.10, Charikar
92. Qazi Abdul Basit Bakhtiari, 4th district primary court, Kabul	02.06.10, Kabul
93. Zubair Ahmed, Rule of Law unit, UNAMA	27.05.10, Kabul
94. Local journalist	03.06.10, Charikar, 14.05.11, Kabul
95. Local man	05.06.10, Central Afghanistan*
96. Abdul Wahid; AIHRC,	05.06.10, Kabul
97. Judge	07.06.10, Central Afghanistan*
98. Elder local man	07.06.10, Central Afghanistan*
99. Elder local man 2	07.06.10, Central Afghanistan*
100. Chief of Criminal investigations Department, Parwan	09.06.10, Charikar
101. Deputy of Criminal investigations Department, Parwan	09.06.10, Charikar
102. Local Jirga 'expert'	12.06.10, Central Afghanistan *
	27.07.12, Kabul
103. Prosecutor, Parwan	15.06.10, 12.05.11, Charikar
104. Shoib Sultani, Defense lawyer	12.06.10, Charikar, 14.05.11 Kabul
105. Young man	11.06.10, Central Afghanistan*
106. Former head of DOWA, Central Afghanistan	13.06.10, Central Afghanistan *
107. Provincial council member, Central Afghanistan	13.06.10 Central Afghanistan *
108. Local journalist 2	15.06.10, Charikar
109. Head of DOWA	15.06.10, Central Afghanistan*
	19.07.10, Central Afghanistan*
110. Mohammad Haroon Azimi, UNAMA.	17.06.10, Kabul
111. Chief prosecutor	21.06.10, 10.07.10, Central
Afghanistan*	
112. Head of provincial council	20.06.10, Central Afghanistan*
113. Local man	21.06.10, Central Afghanistan*
114. Chief judge, provincial court	21.06.10, Central Afghanistan*
115. Prosecutor	21.06.10, Central Afghanistan*
	10.07.10, Central Afghanistan*
116. Local Jirga expert 2	20.06.10, Central Afghanistan*
117. Prison attorney	10.07.10, Central Afghanistan*
118. Local woman	22.06.10, Charikar
119. Local man	22.06.10, Charikar
120. Qazi Parveen, AIHRC	26.06.10, Kabul
121. Manager, Women for Afghan Women shelter	26.06.10, Kabul
122. Ismaeil Hakimi, Ministry of Justice	14.07.10, Kabul
123. Frasier Hurts, Legal advisor, DFID	25.07.10, Kabul
124. Senior MOWA official	26.07.10, Kabul
125. Renee Carrico, Justice Sector Support Program	01.08.10, Kabul
126. Religious leader, Kunduz	28.08.10, Kunduz*
127. Staff member, AIHRC, Kunduz	29.08.10, Kunduz*

128.	Local man, Kunduz	31.08.10, Kunduz*
129.	Local man 2, Kunduz	31.08.10, Kunduz*
130.	Local man 3	31.08.10, Kunduz*
131.	Local elder	02.09.10, Kunduz*
132.	Local man 4	02.09.10, Kunduz*
133.	Deborah Smith, Checchi & Company	03.09.10, Kabul
134.	Fahim Hakim, AIHRC,	10.05.11, Kabul
135.	Tim Luccaro, USIP	11.05.11, Kabul
136.	Sylvana Sinha, USIP	11.05.11, Kabul
137.	Prosecutor 2, Parwan	12.05.11, Kabul
138.	Prosecutor 3, Parwan	12.05.11, Kabul
139.	Qazi Akbar Muktar, Primary court, Charikar	13.05.11, Kabul
140.	Huma Safi, Women for Afghan Women	13.05.11, Kabul
141.	Nasto Naderi, TV journalist	15.05.11, Kabul
142.	Diplomat, US embassy	17.05.11, Kabul
143.	Diplomat 2, US embassy,	17.05.11, Kabul
144.	Wazhma Forough, activist	17.05.11, Kabul
145.	Staff member, Afghan human rights organization	12.03.12, Kabul

## **ANNEX 2: List of Violence in the EVAW law**

1. Rape;
2. Forced prostitution;
3. Publicizing the identity of a victim in a damaging way;
4. Burning or use of chemical substances;
5. Forcing a woman to commit suicide or to self-immolate;
6. Causing injury or disability;
7. Beating;
8. Selling and buying women for the purpose of or under pretext of marriage;
9. *Baad* (giving away a woman or girl to settle a dispute);
10. Forced marriage;
11. Prohibiting the choice of a husband;
12. Marriage before the legal age;
13. Cursing , humiliation or intimidation;
14. Harassment or persecution;
15. Forced isolation;
16. Forced drug consumption
17. Denial of inheritance rights;
18. Denial of the right to property;
19. Denial of the right to education, work and access to health services and other rights provided by law;
20. Forced labour;
21. Marrying more than one wife without observing Article 86 of the Civil Code;
22. Denial of relationship.