

Sippi Azarbaijani-Moghaddam

Including Marginalised Groups in the Legal System  
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While there are many definitions of marginalized groups, I will focus exclusively on the situation of women. In the last two decades a number of historically marginalised groups in Afghanistan, such as the Shiite Hazaras and even Ismailis, were able to take up arms in order to convey their dissatisfaction with the status quo and, thus, now factor in state security computations. Other marginalized groups, such as the Kuchis, also seem to act somewhat more collectively through existing tribal structures. Women, however, have not resorted to collective or armed action to gain power and, being powerless, can be further marginalised if need be. Thus, to focus the paper, I will talk about the inclusion of women in the legal system and examine some of the entry points, hindrances, and inadvisable approaches.

Historically, gender discrimination for a variety of reasons has led to the consistent marginalisation of the majority of Afghan women, from health care and education, as well as economics and the legal system. The compounded result of decades of discrimination at different levels of Afghan society has left many women disenfranchised due to lack of security, mobility, literacy and an ability to earn an independent livelihood.

In the past two decades in Afghanistan, disputes have been solved through a variety of new and traditional methods, parallel to fragmented and reduced but functioning state structures. The Constitution and Judicial Reform Commissions are currently tasked with weaving as many of the existing strands as possible into a coherent process of legal reform at national level. These important accessories to the process of legitimising the current government, beyond the confines of Kabul, are bound to be characterised by heated debate. Discussions on historically controversial topics such as the gender issue and the role of Islam over Afghanistan's legal framework will no doubt involve a great deal of delicate manoeuvring and circumvention.

### **Taking History, Traditional Structures and the Family into Account**

The 1964 constitution granted women a great deal of freedoms and possibilities on paper but it was the practised law of the land, highly discriminatory and anachronistic in some details, and actual implementation of that law on the ground which has consistently left women in a bind. Consider the following example:

*Tribal Laws:* In many regions of Afghanistan, especially where central state authority has been weak, people turn to community leaders, tribal councils and other forms of mediation, as opposed to official courts, to solve legal disputes. Pushtun areas in particular are known for their elaborate tribal justice system. On the one hand, incorporation of customary and tribal law is a key issue for Afghan politics since it has the potential to undermine the legitimacy and enforceability of any legal system beyond the confines of Kabul. Denial of access to these

traditional systems at this sensitive juncture can be seen as undemocratic and threaten the legitimacy of the legal reform process. On the other hand, one has to look into the sections of tribal law that would lead to a continuation of a number of discriminatory practices against women, which even run counter to the tenets of Islam, for example, *bad*, the giving of women in exchange for crimes committed. It will be impossible to reject the existing bodies of tribal law in their entirety as this will damage the legal reform process, but, at the same time, there is no need to take on board practices which are highly discriminatory against women.

*Recommendation:* As part of the legal reform process, customary law should be researched in detail with a view to empowering groups who suffer discrimination as a direct result of such codices to challenge practices which perpetuate their mistreatment. This may avoid a trajectory which ends in rejection of the reformed legal system and could instead result in giving women in some regions rights which they have never enjoyed. This is, however, a tricky and complex area to tackle and does not lend itself easily to quick fixes and instant democracy deadlines.

Similar to promoting understanding of tribal structures and legal systems, a realisation of the *elasticity* of family boundaries is the key to help women link into national systems. This is often influenced by intricate social intra and inter-familial, as well as community relationships. The gender dynamics within these relationships determine women's access to legal advice, assistance or arbitration in disputes at family and community level. We have to understand that even within a framework of functioning and enforceable laws, women would have to emerge from the confines of family and community to interact with the legal system. We do not know enough about the internal gender dynamics of family and community in relation to legal assistance to ascertain how we will help women stretch the private boundaries to overlap into the public domain, and, to determine how the legal system has to be made more accessible at different levels.

*Recommendation:* A vital part of the research underpinning the legal reform process should involve investigating the gender dynamics of accessing legal assistance from within the family and the community.

### **A Multi-Faceted Approach**

Too often, we do not see the complete picture, or we execute the old top down approach, trying to influence the micro-level from a macro point of view. While this may work in other countries, my earlier elaboration of the power that families and traditional structures hold should make us re-think our current approach and to start focusing largely on a bottom-up approach which may be costly and slow but ultimately more effective.

Although the gender picture in Afghanistan is dreary, women have been able to affect politics and violence at micro-level by, for instance, enabling and assisting their men folk to join the jihad, various militia groups or the Taliban. Their work in carpet weaving and handicrafts at the micro-level allows some men to become wealthy at middle and macro-level. No one programme in Afghanistan is helping women create effective overlaps between the micro and macro in any sector, in meaningful numbers. In fact an examination of programmes points to an unwitting policy of keeping most women entrenched at the micro-level while a miniscule

number of women operate in the ether above. The dearth of actual quality time spent looking for lasting solutions to the predicament of the majority of Afghan women leaves me firmly convinced that to date the last minute scramble to involve a quota of women in various national processes and consultations has largely been tokenistic.

*Recommendation:* Instead of involving a small number of women in national processes, as a form of window dressing, it would be far more advisable to mobilise women in larger numbers at the grassroots as well, in order to understand, to engage and to choose their own representatives for various processes as often as possible. Such a course of action may be costly and time-consuming but the alternative is lip-service and ultimately, failure.

### **Pacing Change**

With this in mind, if we look at current efforts to provide legal advice and assistance to Afghan women quite often we see it coming in piecemeal packages from foreigners with little or no knowledge, appreciation or interest in Islam and Islamic law. It is with a sense of foreboding that I have listened to a number of newly arrived women's rights activists complaining that Islam is "bad" for women and others moaning about Afghan women's adherence to Islamic values, asking when they would "get their act together" and become "modern". What better way to alienate more conservative elements and to depict women's access to their rights within a legal system as a controversial issue which is being appropriated by infidels.

In sum, there are two groups who are very different in their nature but both united in doing a great disservice to Afghan women. The first group of secular Afghans, from the minority group described in more detail below, actually promote a "go-imperceptibly-slow" approach on the gender issue, which their international male counterparts gladly follow. Linguistic, cultural and religious sensory deprivation has left many internationals over-reliant on a small group of 'progressive' Afghans, from a narrow stratum of society, which has historically misinterpreted the myriad nuances of Afghanistan through a myopic social lens with unsuccessful results. But even this minority group, often with unrepresentative views, accommodate a range of seemingly incompatible ultra-modern and ultra-conservative stances, utilising all the correct vocabulary and concepts while still having to control, for instance, the dress code and mobility of their female colleagues and womenfolk in order to convey the right impression of honourable manliness in their own extended family and socio-political networks.

The second group is of newly arrived international females who seem to have a barely masked contempt for Afghan culture and Islam, and tear around Kabul and some other parts of Afghanistan like loose canons, expecting instant change. For both groups, there is no sane middle ground where Afghans and their religion of Islam are seen as progressive and capable of embracing change in their own time.

*Recommendation:* Donor countries should be very careful before supporting particular packages for advancing women's rights as they may appear promising to western eyes but could be extremely damaging if implemented hastily on the ground. After all, alienation of certain political and religious forces tends to lead to a backlash against rapid reformist change however well meant. We only need

to consider Afghan history for examples of the oscillation between liberal and oppressive, religious and secular, as one or more groups were repressed or alienated. At the same time, however, society is ever changing and views on gender have mutated as Afghans have experienced other social, geographical and political environments. We should not be afraid of pushing forward and experimenting with the elasticity of gender boundaries in a well- thought out and appropriate manner.

### **The Role of Islam**

Most Afghans see Islam as an integral part of their history and culture. “[M]uch of Afghan law, including the Civil, and Penal Codes, is Islamic, and – equally importantly – is perceived as Islamic.” Islamic law in Afghanistan is not a straightforward matter and it must be kept in mind that there are grey areas since there is no standard of Islamic law, no acceptable arbiters of this standard and no guidance for issues regarding precedence when Islamic law comes into conflict with other sources of law. Secularisation of the legal system may be effected superficially but variations of Islamic law tinged with customary practice will continue to thrive in the provincial and rural hinterland for many years to come. A succession of interpretations has resulted in discriminatory practices against women but there is unexploited room to manoeuvre in some, but unfortunately not all, quarters at present. Some women have their own ways of navigating the more traditional terrain in relation to seeking justice but we do not know enough about such processes to duplicate them and use them to mobilise larger numbers of women.

*Recommendation:* Afghan women will be dealing with variants of Islamic law for many years to come and need allies and skills to navigate existing systems. At this moment in Afghanistan’s history some conservative religious groups are open to compromise and to revisit some disputed areas such as women’s employment and girls’ education. This fertile ground for Afghan women to interact with such groups must be exploited. It could prove empowering for Afghan women to explore their Islamic heritage, to interpret it and to learn to control it rather than vice versa. The key is to build alliances and to use Islam to argue for equality issues. At present there would appear to be little or no effort to assist Afghan women in doing this on a significant scale.

### **Human Security versus State Security**

We may be able to convince families that the legal system is there to help them, and that allowing women to access the legal system will ultimately improve family well-being from a number of angles. But how can families become convinced that it is safe for their women to partially or fully emerge from the safety of the home to link up with any government initiative when Afghanistan is in a situation where human security is under threat due to the fall out of involving warlords to achieve larger geopolitical goals in the War on Terror. In a system where actors other than the state have monopoly over the use of violence, where those actors can obstruct the course of justice and where specific military and political groups linked closely with the state apparatus appear untouchable, everyone is potentially marginalised from access to legal redress. Where families perceive the state as a threat, corrupt or unable to control those who are, they will mistrust state systems, especially if they have heard from charismatic and authoritative religious figures that they smack of anti-Islamic or anti-Afghan sentiment. Apart

from the current situation, Afghan history in the past two decades has buffeted men and women with conflicting ideologies and many have become wary of an enthusiastic response to the latest fad from Kabul. In this environment families will continue to keep their women and girls away from situations which they mistrust or fail to understand.

It cannot be denied that according to certain analyses, addressing gender issues in the Afghan context is vital from a human security angle but dangerous from a state security point of view. In fact those determining state security, often with no gender experts among them, can usually afford to circumvent and ignore the gender issue. Already we are seeing women excluded from certain democracy promoting projects, because of the logistics of reaching women in some cases, as well as fears from some quarters that involving rural women could upset conservative sensibilities in the provinces and stall the process – and this with no meaningful consultations with the communities who will be affected.

*Recommendation:* It is easy to see that women's involvement can always be put on a back burner until some mythical future period of mutual peace and harmony but ignoring them makes any democracy project appear laughable. True commitment to empowering marginalised groups involves balancing state security and geopolitical concerns against those related to human security, based on sound analyses.

## **Conclusion**

In addition to involving women at national level, we must begin looking at ways to involve large numbers of women in the legal system and its reform at family level. Families need to be convinced that it is safe to allow women to do this. It is essential that the research underpinning the legal reform process looks, in the short and medium term, at the mosaic of intimate human and social relations which surround the practice of law, especially with regard to marginalised groups such as women.

Bringing in non-Muslim outsiders to help women gain access to the legal reform process is a superficial, Kabul-centric exercise and does not help the majority of Afghan women. Instead of cultivating the polarized stances on Islamic law which are emerging from the legal reform process, especially where it comes to marginalised groups, there is a need for dialogue, consultation and inclusion, not only of regional interlocutors but also of conservative religious elements holding, whether we like it or not, a wealth of relevant experience. Seeking common ground for compromise rather than outright exclusion of particular groups is a better option for guaranteeing success in securing women's involvement. Examples from around the Islamic world have shown that Islam and Islamic law can be progressive and capable of embracing change. But this process can only come from within – it can be supported but not imposed by external actors.

Involving women at the lowest levels, initiating debates and research at family and community level, encouraging and supporting women to engage conservative elements in gender debates linked to the process of legal reform – to some these may seem like threats to the current status quo, state security and geopolitical considerations but they are essential for human security and a sustainable inclusion of women in the legal reform process.

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<sup>i</sup> Harvard Program on Humanitarian Policy and Conflict Research – Conflict Prevention Initiative  
*Afghan Legal Reform: Challenges and Opportunities* HPCR Policy Brief, January 2003