

Gender Discrimination within the Afghan Judicial
System

By Humira Noorestani

Bachelors of Law American University Central Asia

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Table of Contents	
Abstract.....	3
Methodology.....	4
Introduction.....	6
Afghanistan Supreme Court.....	8
Justice’s Qualifications.....	13
Afghan Constitution.....	14
Shariah Law.....	17
Sources Geared at women’s incapacity to lead or be judges.....	21
Hadith.....	23
Sources that support equality between men and women.....	26
Arguments between sources and differing interpretations.....	27
Problems within the Afghan Judicial System.....	28
International Obligations.....	31
Comparative Analysis.....	37
Conclusion.....	39

Abstract

This paper will examine the reasoning behind the lack of women judges at the Afghan Supreme Court level. I will analyze whether the non-appointment of women Supreme Court Justices is intentional due to political and social reasons or whether there are laws that prevent women from rising to the high judicial positions. Afghanistan currently lacks a uniform legal system. The rule of law remains one of the biggest challenges ahead of the national government. The lack of control within the government is one of the main criticisms of Afghan President, Hamid Karzai. Even more appalling is the level of discrimination that occurs within the Afghan government's judicial system. Ideally, a judicial system is impartial and free of discriminations. It is here that the laws of the land are created and should be just to all regardless of sex, race, financial status, or religion. Moreover, the Afghan current judicial system suffers from many systematic and logistical flaws which include the discriminatory, man-favoring legal statutes and low salaries for employees of the judicial system such as those for judges, police officers and prison guards which expose them to corruption. The Afghan government must carry out its obligatory duties not only through its domestic laws but also, its international legal obligations. In this paper, I will examine whether Afghanistan abides by the clauses of the Convention on Elimination Discrimination against Women (CEDAW) in which Afghanistan is party to. The goal of the creation of CEDAW is to reaffirm faith in fundamental human rights, in the dignity, and worth of the human person, in the equal rights of men and women. Moreover, I will examine Article 14 of the European Convention on Human Rights. Although Afghanistan is not party to this convention, Article 14's anti-discrimination clause is a widely accepted principle and included similarly, in other international treaties and documents which Afghanistan is a party to. Many of the conventions Afghanistan is party go hand and hand where if violations are made in one treaty, it is very likely they are violating other obligations. The Universal Declaration of Human Rights is one such agreement that Afghanistan has accepted and although the document is not binding, Afghanistan's affirmation to the principles and its international universality and wide acceptance make it applicable to Afghanistan.

In conducting my research, my objective was primarily to examine the Afghan legal system established under the Constitution, other pertinent laws such as the Law of the Organization

and Jurisdiction of the Courts of the Judiciary of the Islamic Republic of Afghanistan, against the benchmark of international human rights standards and Afghanistan's international obligations focused primarily on gender equality and women's participation in all sectors of society. I conducted this research in order to determine whether there is systematic discrimination against women in the Afghan judicial system through its legislation and in practice. I further examined the discrimination against women and focused primarily within the Afghan Supreme Court. I hope to use this research and present it to the Afghan government and various NGOs and think tanks in the future. Furthermore, I wanted to analyze the reasoning as to why there is a lack of women judges in the Supreme Court and attempted to detect whether there are discriminations elsewhere in the judicial system.

Methodology:

For my methodology, I have examined the Afghan Constitution to find clauses that pertain to and address the issue of discrimination. I have deciphered the meaning of these clauses to investigate if there is room for discrimination or if there are gaps on the subject matter that need to be developed. In addition, I have examined the section on the judicial system within the Afghan constitution to determine how the government intended to structure the system. I then observed the system in practical terms in order to determine if it abides by constitutional law. Due to the fact that Afghanistan is an Islamic state, I have examined Shariah law in combination with Afghan law. Afghan law consists of both Shariah law and Afghan national legislation and follows the Hanafi interpretation of Islamic law for the majority of the country. However, it is worth noting that in cases of dispute involving the Shia Muslim population, Shia law is applied. Thus, the current Afghan constitution recognizes Shia Islam as an official religion of Afghanistan alongside Sunni Islamic thought.

Within Shariah law, I will observe whether there is any mention of the permissibility of women judges and more specifically, Supreme Court judges. Following the examination of Afghan national legislation, I will examine Afghanistan's international obligations through various enactments and treaties. Within these international obligations, I will determine whether Afghanistan has made any commitments to fair treatment within all sectors of the Afghan

government and locate any discrimination clauses within these treaties. In order to obtain a realistic picture of the situation in Afghanistan's judicial system, I will read through newspaper articles pertaining to the topic as well as conduct personal interviews with experts in the field.

One of my major resources for my research was the Afghanistan Supreme Court website. Due to the reason that Afghanistan is still in a state of transition following the many years of war, one can see many gaps in its judicial system which is very evident in the incomplete website. Many links exist that indicate laws or articles and the links do not work. However, upon my examination of a tab listed "selected cases" and according to the provinces, I looked at the selected cases in Kabul, the Afghan capitol. Kabul is by far the most liberal city of the conservative cities within Afghanistan. That being said, the least conservative of the ultra conservative cities will most likely be more open to gender discrimination cases as many of the other courts within the country would not even want to address the issue. Afghanistan being a patriarchal society makes it difficult for women to bring about court hearings claiming gender discrimination even in Kabul city. The fact that such cases are almost nonexistent does not directly correlate with the reality of gender discrimination within Afghanistan rather, it further iterates the stigma involved with raising gender discrimination issues. Surely enough, of the 346 or so cases that were listed (just a list of the type of charge, date and the court holding excludes, detail case information or names) there were no cases in reference to discrimination.¹ Many of the cases listed dealt with narcotics charges or murder. I question whether the Afghan society was free of discrimination—which seems unlikely—or that discrimination was not on the judiciary system's radar as these cases hint! Moreover, it is uncommon for traditional societies such as those that Afghanistan encompasses to have a high report rate of human rights abuses caused by the stigma that is connected with being a victim of crimes such as spousal abuses. In other words, saving face in society is weighted very heavily in traditional countries such as Afghanistan. Therefore, although many human rights abuses do exist within the country as non governmental organizations deal with, they don't necessarily make it to a court proceeding and thus, the statistics on the Afghanistan Court website is not a good representation of the amount of abuses occurring within the country. Thus, there is not a strong

¹ Supreme Court of Afghanistan, www.supremecourt.gov.af

correlation between the number and kinds of abuses occurred and those that are reported and filed in court.

Afghanistan is lagging largely behind developed democratic Western countries in having strong representation of women in the judicial sector of society. However, it is not most appropriate to compare Afghanistan equality towards women with very well established democracies. Thus, I will examine in this paper whether Afghanistan is alone in its marginalization of women from the judicial system of the country or if it is common with other countries which hold similar cultural and religious values and to countries geographically in close proximity to Afghanistan. One must understand that Afghanistan is a new developing country and has suffered thirty years of turmoil in what is considered the worst conflict in modern history.

Introduction:

Afghanistan has a structured civil law system that abides by Islamic Shariah law. Thus although there is an Afghan Constitution as well as other laws in Afghanistan and many international binding agreements, no law can take precedence over Islamic Shariah law. Following the fall of the Taliban, there was a great deal of pressure from the international community especially, donor countries to re-create Afghanistan's legal system where it would be in line with modern international universal principles. Many documents were ratified and many promises made taking into account to some degree Afghanistan's cultural and religious norms. However, many decisions were made in haste and without realizing the actual impact following these agreements word for word would have on the society. Moreover, some scholars argue that by virtue of the nature of the religion of Islam, men and women are not held equal. Thus, these critics question how then can Afghanistan be obliged through international agreements that set men and women equal in society calling on the government to take certain steps in reaching that point and holding perpetrators responsible for violating such rules and on the other hand having Islamic law as the supreme law of the land. However, much of the Muslim world believe that Islamic law is not discriminatory towards women and that if followed properly would create a utopian society where men and women enjoy freedoms on the same level different from the West.

According to Rachel Reid's testimony to the Foreign Relations Committee, women's situation has improved drastically in Afghanistan since the fall of the Taliban evidence of this is the return of two million girls to school and a quarter of the Afghan parliament encompassed by women due to a constitutional guarantee.² However, in order to better understand discrimination within the Afghan judicial system, one needs to be aware of the current situation in Afghanistan especially, in reference to stability and women's rights. Currently, only four percent of school age girls reach the tenth grade level. Although more girls are going to school which is a large leap forward from the Taliban rule of complete prohibition of females attaining education, Afghanistan still lags severely behind the rest of the world. Moreover, quite astounding to the world given all the promises by the Afghan government and severe developments, the passage of the *2009 Shia Personal Status law* was a reversal to the freedoms Afghan women gained with the new government following the toppling of the Taliban regime. *The Shia Personal status law* regulates marriage, divorce, and inheritance for Afghanistan's Shia population. Included are provisions that require a woman to ask permission to leave the house except on urgent business, a duty to "make herself up" or "dress up" for her husband when demanded, and a duty not to refuse sex when her husband desires it. This introduction and passage of this law was shocking to many especially, human rights activists and feminists throughout the world.

The provisions of the *Shia Personal Status Law* directly contradict the Afghan Constitution which prohibits discrimination in this case, between men and women. Evident of this is Article 22 of the Afghan Constitution which states that men and women have equal rights and duties before the law. In the case of the "Shia Personal Status Law, men are given the right of superiority over women over daily matters as well as sexual rights. Moreover, the law also contradicts the Convention on the Elimination of all forms of Discrimination against Women in which Afghanistan is party to.³ Although the Shia population of Afghanistan account for 20% of the population meaning that the law would only, be applicable to them, this is a large move backward for Shia women.⁴ Thus, in disputes between married couples whom are a part of the Shia faith, the courts apply Shia law in this case, disfavoring women. Another appalling action

² <http://www.hrw.org/en/news/2010/02/24/testimony-rachel-reid-senate-foreign-relations-committee>

³ <http://www.hrw.org/en/news/2009/04/14/afghanistan-new-law-threatens-women-s-freedom>

⁴ <http://kabalpress.org/my/spip.php?article3418>

against women in Afghanistan is President Karzai's recent decree seeking to reduce the number of reserved seats for women in the Parliament. These actions are taken by the President in an attempt to satisfy the demands and pressures of ultra conservative groups.

Women continue to face extreme discrimination in Afghanistan although their situation has improved drastically since the fall of the Taliban. Over the past couple of years however, there has been deterioration of the upward trend and in some cases, there is a negative trend. This could prove to be very dangerous for women within the society.

One main barrier to success is lawlessness. Lawlessness throughout the country is manifest in several forms. Local warlords and other insurgent forces exercise power outside Kabul through intimidation, force and violence. Drug trade has increased dramatically, with Afghanistan now producing 87% of the world's supply of opium, according to the United Nations.⁵

In this context and in the absence of a centralized, transparent and effective system of justice, women continue to suffer a range of human rights abuses. Women and girls are being trafficked into prostitution. They are being forced into marriage, often to settle family debts or disputes, and imprisoned for running away from forced marriage. Women trapped in abusive or forced relationships have been driven to suicide as a form of escape and hundreds of cases of self-immolation are reported every year. Given the lack of security and high levels of harassment, many women, especially those living outside the capital Kabul, feel compelled for their own safety to continue to wear the burqa.⁶

Afghanistan Supreme Court:

The Afghan Supreme Court is currently led by Chief Justice of Afghanistan, Professor Abdul Salaam Azimi. Justice Azimi replaced the ultraconservative Chief Justice Hadi Shinwari. Justice Shinwari once told the Christian Science Monitor: "If a woman becomes a top judge, what would happen when she has a

⁵ <http://www.rawa.org/equ-now.htm>

⁶ Ibid

menstruation cycle once a month, and she cannot go to the mosque?"⁷ Moreover, he noted: "We have many women judges here, but a woman cannot be a judge over the general country, and she cannot sit in this chair," These sorts of statements are not unique to ex Chief Justice Shinwari in fact, many mullah's and supporters of keeping women away from the judicial system of Afghanistan use such arguments. The realization of this right, and women's access to justice in Afghanistan, have to date been severely impeded by the Supreme Court when headed by Chief Justice Fazul Hadi Shinwari. Originally appointed by former President Burhanuddin Rabbani, a conservative chief of the Northern Alliance, Justice Shinwari was later reconfirmed by President Karzai under the transitional administration in June 2002.

Although as Chief Justice he is the guardian of the rights enshrined in the Constitution, Mr. Shinwari made several attempts to ban women from singing and dancing in public. In November 2004, the Supreme Court issued a ban on cable television channels, particularly condemning films from India showing women singing and dancing in musicals dressed in modern Western attire. Mr. Shinwari has suggested that women should cover their bodies entirely, exposing only their faces and hands, and he has stated that a woman cannot travel for more than three days without a mahram, a husband or a male relative she cannot legally marry. He has also stated that adulterers should be stoned to death. During the campaign for the presidential elections in October 2004, Mr. Shinwari attempted to have a presidential candidate removed from the ballot for suggesting that women and men should have equal rights in marriage and divorce.⁸

In the transitional administration, Mr. Shinwari appointed numerous judges at all levels, all of whom are male and many of whom do not meet the requirements set forth in Article 118 of the Constitution, which call for "a higher education in law or Islamic jurisprudence" and "sufficient expertise and experience in the judicial system of Afghanistan". Many of Mr. Shinwari's appointments serve on the Supreme Court, which now has a reported 137 members and possibly more--a number that surpasses the 9 justice positions authorized by the Constitution. One Supreme Court judge was reported to have stated very recently that it was impossible for men

⁷ Women for Afghan Women, Speech by Manijha Naderi, <http://www.womenforafghanwomen.org/about/ManizhaSpeech.html>

⁸ <http://www.rawa.org/equ-now.htm>

and women to have equal rights. It is this same Supreme Court that is charged with ensuring compliance with the Constitution and its guarantee of equal rights for women.

Chief Justice Professor Azimi said: “An important step in reforming our judicial system is improvement in the efficiency and quality of our procedures, after seeking the assistance of God, the Almighty; we look to our judges and their staff to ensure we succeed in our plans for reform.” The Chicago Tribune notes that the new Chief Justice, Azimi has launched a quiet revolution in reforming the judicial system of Afghanistan. Change is happening, it adds. The Chicago Tribune claims that Justice Azimi has already fired or jailed eight corrupt judges and four clerks. It goes on to say that that he is also setting up a system of standards and accountability by asking the judges to submit monthly reports on their cases. In addition, Justice Azimi is leading the review of 6000 old cases.⁹

The Afghanistan Supreme Court abides by the Law of the Organization and Jurisdiction of the Courts of the Judiciary of the Islamic Republic of Afghanistan. Article 1 of this law states: “This law has been enacted pursuant to the provisions of Articles 116 and 123 of the Constitution for the purpose of managing the affairs related to the organization of the judiciary, duties and powers of the Supreme Court, primary and appeal courts and judges of the Islamic Republic of Afghanistan”.¹⁰ Thus, this law abides with the Afghan constitution which we will examine in the next part of this paper. This law provides detail of the operation of the Afghan Judiciary. Moreover, Article 5 states: “The parties to the case may appeal against decisions issued by the lower courts in accordance with law”. The final decisions of the courts shall be considered exception to this provision. The Supreme Court is where people can bring cases if they feel that the lower courts did not base their decision abiding by the Afghan constitution. With the ability for lower court decisions to be challenged at the Supreme Court level, this may be very harmful for women in that there sit no women judges in the Supreme Court. In Afghanistan’s traditional society human rights abuses are rarely reported to any institution let alone an action of a filing taken through the court system. The failure to report human rights abuses occurs for many reasons some of which are the lack of confidence in receiving justice

⁹ At the Supreme Court and Unlikely New Hero, Chicago Tribune, <http://www.chicagotribune.com/news/opinion/chi-0701210351jan21,0,7944559.story>

¹⁰ Law of the Organization and Jurisdiction of the Courts of the Judiciary of the Islamic Republic of Afghanistan

and to safe face. If a woman were to file a case challenging a spousal abuse for example and if her spouse is proven innocent in a lower court, her chances of appeal in a Supreme Court are most likely, going to work negatively against her owing to the fact that there are no women justices. This may put the woman in greater risk for the husband will go unpunished and she will probably have to face him at home again where he may be willing to abuse her again.

Another issue with the Afghan judicial system is the absence of objectivity in many cases. Chief Justices Shinwari's statements are evidence that there is a use of emotions when dealing with judging cases as oppose to solely, being objective and applying various laws. As stated above for example, it is not clear why it is relevant for a woman to go to a mosque when she is a Supreme Court Justice. Shinwari questioned how the Supreme Court Justice would go to a mosque when during her monthly menstruation. Chief Justice Shinwari through his statements is assuming that women cannot perform their jobs properly during their monthly menstruation cycles. Many people within Afghanistan understand the court system and that it many times favors the man and hope is lost by women when they are aware that the Supreme Court only has male Justices. Therefore, many women would be reluctant to take the case to a higher level assuming that they would be further shamed by a panel of male Judges whom wouldn't try her case based on Shariah and Afghan law but would instead try her case based on emotions and personal views.

There are many barriers for women to seek justice in Afghanistan. Firstly, many women are either prohibited by their families to bring their case forward to a male judge or are themselves not able to openly express their concerns before a male judge again, because of the stigma's attached to it given that Afghanistan is a traditional Islamic country. Secondly, in most cases, male judges favor the male in situations where one sex is charging the other sex usually, evidenced in divorce cases. Clearly, this suggests that certain sections of the society—such as women—are in a disadvantageous position in the judicial system. As an Afghan by origin, I am aware that culturally, it is viewed as less than favorable to bring a human rights case to the court, the woman's name may be tarnished for the rest of her life.

Shame is not the only barrier for a woman; her economic situation may prove to be the greatest barrier. Most women in Afghanistan especially, those whom live outside the cities, do not generate an income through work. If a woman does bring a case to a court, she may face difficulties defending her case on her own or find it hard to get an attorney especially, if she does not generate her own income. As such, the problem here for women is both of substance and judicial design even for ordinary cases. In a way, the cycle of dependency does not end for most women in poverty stricken Afghanistan because it is almost impossible for her to find justice if she is not able to sustain herself financially.

Chapter 2, Article 17 of the Law of the Organization and Jurisdiction of the Courts of the Judiciary of the Islamic Republic of Afghanistan deals with the Organization of the Supreme Court and states: “The Supreme Court shall be composed of nine persons appointed by the president in an agreement with Wolesi Jirga in accordance with article one hundred seventeen and one hundred eighteen of the Constitution. The Wolesi Jirga is the Islamic Republic of Afghanistan’s National Assembly.¹¹ Wolesi Jirga translated from the Pashto language means the “House of the People”. The Wolesi Jirga is the lower chamber of the bicameral assembly. The Wolesi Jirga consists of 249 seats directly elected through votes of the people. Members are elected by district and serve for five years.¹²

According to the Law of Organizations, “The president shall appoint one of the members as the Chief of the Supreme Court”.¹³ This appointment must be voted on by the Wolesi Jirga. Given that Afghanistan is a largely patriarchal society and the Wolesi Jirga consists of merely a quarter of women within the parliament, it is very difficult to get the appointment of a women Justice in the Supreme Court due to the conservative or ultraconservatism of the Wolesi Jirga especially, those members which represent rural areas of Afghanistan. The rural regions of Afghanistan encompass nearly 70% of the country. Moreover, it is very unlikely, that President Karzai who has made very discriminatory decisions during this Presidential tenures to appoint a woman to the Supreme Court. Much of President Karzai’s discriminatory decisions based on sex have to do with his desire to satisfy his ultra

¹¹ <http://www.pamirit.com/pve/Default.aspx#>

¹² Law of the Organization and Jurisdiction of the Courts of the Judiciary of the Islamic Republic of Afghanistan

¹³ Ibid

conservative supporters whom voted for him in the recent Afghan elections in August of 2009. For example, in early 2009, Karzai passed a piece of legislation which would be discriminatory to Shia women and pertaining only to Shia women in Afghanistan. These series of legislations legalized the oppression of women in Afghanistan. The new law signed by President Hamid Karzai requires Shiite women to ask their husband's permission before leaving the home and forces them to have sexual intercourse. Although Afghans within Afghanistan and the international community was very optimistic with the fall of the Taliban, such a law by Karzai brings pessimism as to the actual progression towards a democratic society in Afghanistan.

Justice's Qualifications:

After more than 30 years of war and civil unrest, Afghanistan has been left without a formally educated bar and judiciary. Its formal legal training is available through an undergraduate university degree from the Law and Political Science Faculty, or from the Sharia or Islamic Studies Faculty of its university system, which is centered in Kabul, but also has branches in the larger, urban provincial capitals. In order to practice law, graduates of the Law or Sharia Faculties must be admitted to one of three graduate programs—Judicial, Commercial or Government—and complete a one- to two-year academic curriculum and practicum. Unfortunately, as late as 2007, a study showed that only 36.6 percent of Afghanistan's judges had completed a university education in law. And most of Afghanistan's approximately 1,500 judges, especially those in rural provinces, are not graduates of the Judicial Stage; most did not have university degrees or any formal legal training but were appointed by local officials from local or tribal courts by loya jirgas, or meetings of community leaders as the need arose during wartime. The Rule of Law Project, shortly after its implementation in 2005, initiated a project aimed at providing basic legal training to those Afghan judges, who had been pressed into service without having received a formal legal education, by sponsoring a six-week "Foundation Training." The program, which in many ways resembled bar review courses in the U.S., proved to be extremely

successful, providing a “crash course” in core legal subjects to nearly 900 judges over a three-year period.¹⁴

Among the judges trained in the Foundation Training program were 43 women. The first women judges were appointed in 1969, and by 2005 there were 32 women judges and some 400 women lawyers in Kabul. There were also women working as judges, prosecutors and lawyers in other major cities. After the Taliban came to power in 1996, women were banned from public life, but emerged again in 2001, after the Taliban were driven out. In 2003, with support from the U.N., the Afghanistan Women Judges Association (AWJA) was founded but because of deteriorating security, the AWJA suspended operation in December 2008.

According to Mr. Bernard E. Boland there are complaints by women lawyers and judges that are shuffled aside and given little responsibility by their male colleagues. The executive secretary for one of Afghanistan’s nine Supreme Court justices told him that she had been a judge in a province adjoining Kabul, but was given almost nothing to do by her male colleagues. They told her she didn’t need to come to the court every day and they would take care of the caseload. She opted to work as a judicial secretary, apparently believing it was her only alternative if she wanted to do meaningful work. The Judges persevere in a dangerous, low-paying job about an equivalence of \$50 for entry level judges and \$200 for senior level judges.¹⁵

Afghan Constitution:

The current Afghan Constitution became the official law of Afghanistan when the 2003 Loya Jirga approved it by the consensus on January 4, 2004. It evolved out of the Afghan Constitution Commission mandated by the Bonn Agreement. The Bonn Agreement was the initial series of agreements intended to re-create the State of Afghanistan following the U.S. invasion of Afghanistan in response to the September 11, 2001, terrorist attacks. Since no nationally-agreed-upon government had existed in Afghanistan since

¹⁴ Minnesota Law and Politics, My Afghan Journal

¹⁵ <http://www.lawandpolitics.com/minnesota/My-Afghanistan-Journal/3c5bbbe7-1099-4f46-bb42-6d93199c3fc2.html>

1979, it was felt necessary to have a transition period before a permanent government was established. Thus in December 2001, a number of prominent Afghans met under UN auspices in Bonn, Germany, to decide on a plan for governing the country; as a result, the Afghan Interim Authority (AIA) - made up of 30 members, headed by a chairman - was inaugurated on 22 December 2001 with a six-month mandate to be followed by a two-year Transitional Authority (TA), after which elections were held.

Article 8 of Afghanistan's preamble to the Constitution declares the equality amongst its citizens by stating: "For creation of a civil society free of oppression, atrocity, discrimination, and violence and based on the rule of law, social justice, protection of human rights, and dignity, and ensuring the fundamental rights and freedoms of the people".¹⁶ Ch. 2, Art. 1 "Any kind of discrimination and privilege between the citizens of Afghanistan are prohibited. The citizens of Afghanistan – whether man or woman – have equal rights and duties before the law." Moreover, Article 22 of the Constitution explicitly states that women and men are equal before the law.¹⁷ Thus, if men and women are equal according to the Afghan constitution, then, they must also be equal at the highest level of court where this very same constitution is interpreted. Article 3 of the Afghan Constitution provides that "no law can be contrary to the beliefs and provisions of the sacred religion of Islam". It is critical that the Supreme Court ensures that its judgments harmonize these provisions of the Constitution rather than impose singular interpretations of the Koran that are harmful to women and do not respect the constitutional right to equality between men and women.¹⁸

Such rights are given to women solely in name and are in reality, not practiced in society or at the governmental judicial level. In order to understand why there are no women Justices at the Supreme Court we must determine whether it is due to legal, political or cultural reasons or a combination. I will begin by examining the laws of Afghanistan to make certain that its laws are adherent to international standards of holding all citizens equal in society and building an institutional system that is friendly to women. I will take into account culturally sensitive area later that many scholars view as controversial. Firstly, it is important to analyze the legal procedures and standards for the appointment of Supreme Court Justices in Afghanistan. The

¹⁶ Afghanistan Constitution

¹⁷ Ibid

¹⁸ Ibid

best place to start is the Afghan Constitution which is the supreme law of the land and abides strictly by Shariah Law. According to the Afghan Constitution, members of the Afghan Supreme Court are required to have the following qualifications to be a Supreme Court Justice:

The age of the Head of the Supreme Court and its members should not be lower than forty at the time of appointment.

1. Shall be a citizen of Afghanistan.
2. Shall have a higher education in law or in Islamic jurisprudence, and shall have sufficient expertise and experience in the judicial system of Afghanistan.
3. Shall have high ethical standards and a reputation of good deeds.
4. Shall not have been convicted of crimes against humanity, crimes, and sentenced of deprivation of his civil rights by a court.
5. Shall not be a member of any political party during the term of official duty.¹⁹

As one can see, the requirements to be a Supreme Court Justice do not limit it to solely males. Any Afghan citizen who meets the above requirements may become a Supreme Court Justice at least, theoretically. One can say that requirements two and three may be subjective. For requirement number two which states that the Justice to be must have sufficient expertise and experience in the judicial system of Afghanistan. It is not indicated precisely what constitutes “sufficient expertise”. For this reason, I will attempt to find more detailed laws which better identify this gap in the requirement and interview an expert in the field. In the case that there is a lack of a law or legal norm which specifies the exact requirements for a prospective Supreme Court Justice to be deemed as having sufficient expertise, I will look to state practice and through the credentials of current and past Supreme Court Justices. It is my contention that this subjective area in the requirement gives room for the President and the Parliament to appoint Justices on a non-merit based level without breaking the Constitutional Law pertaining to the appointment of Supreme Court Justices.

¹⁹ Afghanistan Constitution

Point three of the requirement that the Supreme Court Justice must have a good reputation and high ethical standards is in my opinion even more subjective. Afghanistan being a war-torn country is home for notorious warlords whom are revered by some as heroes. There are grave differences in character judgment within Afghanistan especially, of its leaders. Much of this has to do with tribal and ethnic divisions which caused many losses of life during the decades of Afghan war. Moreover, many deeds and actions of people have not been officially documented as such a system did not exist during war. Many Afghan warlords and those whom have committed human rights atrocities are walking free within and outside of the country and remain in powerful positions even, within the Afghan government. Thus, point three of the requirements to be a Supreme Court Justice must be analyzed in the context of observing the current Justices and evaluating their backgrounds as well as looking deeper to determine whether other laws give specific requirements in dealing with ethical standards and reputation.

Shariah Law:

Shariah Law is Islam's legal system; it is derived from the Holy Koran, the word of God, the example of the life of the prophet Muhammad (PBUH), and fatwas which are the rulings of Islamic Scholars. The main difference which is vast from Western legal systems is that Shariah law governs or informs of governing every aspect of a Muslims life. Western law for example limits itself to matters relating to crime, contract, civil relationships and individual rights whereas Shariah rulings helps Muslims deal with and understand how to lead every aspect of their life according to God's wishes. Shariah covers a lot of very routine issues of life where observant Muslims want to make sure they are abiding within the legal framework. As is in all legal systems, Shariah is complex and its success is dependent on the quality of experts. There are different schools of thought which lead to different rulings within each school there are different interpretations depending on the scholars. Islamic jurists issue guidance and rulings a ones that are considered a formal legal ruling is called a fatwa.²⁰

²⁰ Council on Foreign Relations, Islamic Shariah Law

Shariah courts exist both in the Muslim world and the Western world. In Muslim countries for the most part the criminal courts and their punishments are derived from Sharia law. In the Western world, Islamic courts mostly deal with business and family disputes.²¹

Sharia developed several hundred years after the Prophet Mohammed's death in 632 CE as the Islamic empire expanded to the edge of North Africa in the West and to China in the East. Since the Prophet Mohammed was considered the most pious of all believers, his life and ways became a model for all other Muslims and were collected by scholars into what is known as the *hadith*. As each locality tried to reconcile local customs and Islam, *hadith* literature grew and developed into distinct schools of Islamic thought: the Sunni schools, Hanbali, Maliki, Shafi'i, Hanafi; and the Shiite school, Ja'fari. Named after the scholars that inspired them, they differ in the weight each applies to the sources from which sharia is derived, the Quran, *hadith*, Islamic scholars, and consensus of the community.

The Hanbali school, known for following the most Orthodox form of Islam, is embraced in Saudi Arabia and by the Taliban. The Hanafi school, known for being the most liberal and the most focused on reason and analogy, is dominant among Sunnis in Central Asia, Egypt, Pakistan, India, China, Turkey, the Balkans, and the Caucasus.²²

Marriage and divorce are the most significant aspects of Sharia, but criminal law is the most controversial. In sharia, there are different categories of offenses those that are prescribed a specific punishment in the Quran, known as *hadd* punishments, those that fall under a judge's discretion, and those resolved through a tit-for-tat measure such as blood money paid to the family of a murder victim. There are five *hadd* crimes: unlawful sexual intercourse (sex outside of marriage and adultery), false accusation of unlawful sexual intercourse, wine drinking (all alcohol drinking), theft, and highway robbery. Punishments for *hadd* offenses--flogging, stoning, amputation, exile, or execution--get a significant amount of media attention when they occur. These sentences are not often prescribed, however. It is worth noting however, that most countries although embedded into their legal systems, do not actually use such punishments.

²¹ http://news.bbc.co.uk/2/hi/uk_news/7234870.stm

²² Ibid

With all the different interpretations that can occur dealing with such a complex legal system it is a no wonder that there is much controversy especially, in a country such as Afghanistan. Judges in Afghanistan must be knowledgeable of both Shariah law and its other laws which cannot contradict Islamic Shariah Law. According to the Afghan Women's Judges Association there are roughly 2000 sitting judges in Afghanistan as of 2006 and 65 to 70 percent of those judges are women. However, the Afghanistan Supreme Court gives an estimate of about 1500 sitting judges.²³ Of the 1500 or 2000 judges in Afghanistan, not even one of those judges is serving as a female justice on the Scholar Council of the Supreme Court. In interviews with senior male judges, it was found that one of the main reasons women were not sitting in Afghanistan's highest court is because many legislators believe women are not knowledgeable enough in religious jurisprudence. However, the very fact that there are more women judges throughout Afghanistan in the lower courts and knowing that even, the lower courts abide completely by Islamic Shariah law, this argument against women serving as Supreme Court Justices due to their lack of religious knowledge is null.

Article 3, Chapter 1 of Afghanistan's Constitution states: "In Afghanistan, no law can be contrary to the beliefs and provisions of the sacred religion of Islam".²⁴ When examining this, I found that there is not any Islamic law that forbids a woman from holding a judicial position—even at the highest level. The argument that most conservative legislators make is that since women are not "Islamically" allowed to serve as mullahs, or religious clerics, they are not well trained enough in Islamic jurisprudence to serve as Supreme Court justices!²⁵ Were this to be true, it would be a strong argument in that women are not capable enough through their knowledge of Islam particularly, Shariah law to apply Islamic law in making decisions. Addressing the issue of whether or not women are able to serve as religious clerics or "mullahs" is another topic in which this paper is not addressing. However, I was also, not able to locate any Islamic evidence supporting the opinion that women are not permitted through Islamic Jurisprudence to serve as religious clerics. Furthermore, currently, there are many cases

²³ Advocating for Women's Participation in Afghanistan's Supreme Court, UNIFEM, www.unifem.org/gender_issues/voices_from_the_field/story.php

²⁴ Afghanistan Constitution

²⁵ Advocating for Women's Participation in Afghanistan's Supreme Court, UNIFEM, www.unifem.org/gender_issues/voices_from_the_field/story.php

in which a religious cleric does not have higher education and although, they may be religious leaders, they are not experts in the area of law, shariah law specifically. Moreover, many women are qualified to be Supreme Court Justices and encompass the adequate knowledge on both Afghan law and Shariah law. The Kabul University Shariah Law Faculty has both male and female students who graduate from their program. This fact is testament that there are women who are capable of serving as a Supreme Court Justice. Additionally, many of the current women judges in Afghanistan are more trained in law and encompass expertise in Shariah law than some of the current male Supreme Court Justices.

The majority view among the founding jurists of Imam Shafii, Malik and Ibn Hanbal (as I mentioned before as the different schools of thought) regarded women as being disqualified as judges based on an interpretation of Surah an-Nisa' 4:34, that men are *protectors* over women. The minority view of Imam Abu Hanifah, however, opined that the authority of a judge is not valid unless he possesses the qualifications necessary for a witness. Thus this opinion allows women to be judges in all cases except *hudud* and *qisas* cases. This flows from Imam Abu Hanifah's interpretation of Surah al-Baqarah 2:282, on women's eligibility to be witnesses in commercial transactions. There were also the individual views of other jurists such as al-Tabari and Ibn Hazm which stated that a woman can be a judge in all cases without exception as long as she fulfils the requirements for the position. This would also appear to flow from a reading of Surah al-Taubah 9:71, that believing men and women are each other's *awliyya* (protecting friends and guardians).²⁶

Muslims, believe in the revealed nature of the textual sources of the Qur'an, and the authentic Sunnah of the Prophet (PBUH) which is divinely inspired. There is no clear evidence in the textual sources allowing or disallowing women to be leaders or to be appointed as judges. The current views on these two issues are juristic interpretations of several textual sources.

Sources Interpreted Geared towards Women's Incapacity to Lead or be Judges

²⁶ The Holly Koran

Qur'anic Verses

Surah an-Nisa' 4:34 states to the effect that:

Men are *qawwamuna* over women, (on the basis) that Allah has (*faddala*) preferred some of them over others and (on the basis) of what they spend of their property (for the support of women)

This is the parent source from which all juristic opinion of the status and position of women is derived.

This verse has been misinterpreted to mean:

- i) Men have authority over women
- ii) All men are superior to women.

The Qur'an establishes that men are *qawwamuna* (have responsibility) over women. It does not mean that women are incapable of handling their own affairs as though they lack the capacity. It does not mean that women are incapable of assuming leadership roles, whether among women, men and women, or even of nations, as has been assumed.

Rather, it intends to establish the responsibility of men for the protection and maintenance of women in a restricted setting or social context. Biologically, only women can bear the future generations of Muslims. The Qur'an creates a harmonious balance in society by establishing a functional responsibility for males to facilitate this biological function of females. The material responsibility of men in the Qur'an is that they are invested with the responsibility to facilitate this biological function of females. This verse does not give men inherent superiority, but rather establishes mutual responsibility in society.

The word *qawwama* also means 'to provide with the means of subsistence'. The notion of *qawwam* is related to the reason that men spend their property for the support of women. It follows that a man who does not maintain his wife should not be *qawwam*.² Responsibility is not, and cannot be interpreted as, superiority. The material responsibility of men mentioned in the Qur'an, that they are invested with the responsibility of spending for women's support, has

corresponding advantages. It is on the grounds of this responsibility that men are given a double share of inheritance under the *faraid*. However, it should be remembered that the deceased estate's distribution under the *faraid* should only take place after the payment of any debts, and of any bequests or legacies under a will (*wasiyya*).

The Qur'an does not say that "all men are superior to or better than all women". Nor even that all men are preferred by Allah (swt) over all women. Advantages are explicitly specified in the Qur'an. Men have a certain advantage materially, resulting in certain responsibilities (or vice versa). When the Qur'an says that "some (unspecified gender) are preferred by Allah (swt) over others", it uses general language which corresponds exactly with the observable reality in creation: some creatures have some advantages over others—even some humans over others. All men do not always have an advantage over all women, nor all women over all men.

The view that a man is superior to a woman because he is physically "stronger" lacks the support of the Qur'an and authentic Sunnah. The divine sources mention "care" and "responsibility" within the family, but not superiority. Muslim men and women are equal in their individual and social responsibilities, being in charge (protectors) of one another and of the whole society (*awliyya*), as stated in Surah al-Taubah 9:71.²⁷

Besides Surah an-Nisa' 4:34, another verse that is often cited to imply women's lack of capacity is Surah al-Baqarah 2:282, which states to the effect that:

Whenever you take credit for a stated term, set it down in writing. And let a scribe write it down equitably between you And call upon two of your men to act as witnesses; and if the two men are not available to you as witnesses, then a man and two women from among you, so that if one of them should make a mistake, the other could remind her

This verse has been misinterpreted to mean:

- i) evidence of two women equals the evidence of one male
- ii) the moral and intellectual incapacity of women.

²⁷ Fathi Osman (1996), p. 48.

The context of this verse relates to a written loan agreement. The stipulation that two women may be substituted for one male witness does not imply any reflection on woman's moral or intellectual capabilities. It is obviously due to the fact that (at the time of revelation) women were less familiar with business procedures than men and, therefore, more liable to commit mistakes in this respect.²⁸

The unfamiliarity of women at the time of revelation in personally conducting business transactions is demonstrated by the fact that even Khadijah (ra), the wife of the Prophet (saw), left the charge of her business affairs to him. This was the socio-historical context at that time when the verse was revealed. To ensure justice therefore, two women were required for the following purpose: If the female witness errs or forgets, the other is needed, not to give evidence, but to remind her. This is quite acceptable, even today, when women still find the court process intimidating and require another to reassure them and provide moral support. This again corresponds to the observable reality.

It should, in fact, be considered quite remarkable that despite the social constraints at the time of the revelation—inexperience and coercion of women—a woman was nevertheless considered a potential witness. In this modern era, such revolutionary consideration of women's potential should lead to greater promotion of her contributions to a just and moral social system, and end exploitation of her and others in society.²⁹

Hadith

The *hadith* that is often cited to deprive women of leadership positions is a *hadith* related by Abu Bakra to the effect that:

When the news reached the Prophet (saw) that the Persians had made the daughter of Chosroe their ruler he observed: That a nation can never prosper which has assigned its reign to a woman.

²⁸ Muhammad Asad (1980), commentary on Surah 2:282

²⁹ Amina Wadud (1999), p. 86.

For hundreds of years, this *hadith* has been taken to mean by a majority juristic opinion that a woman cannot be a nation's leader (*khalifah*), and as such she should not be allowed to be a judge. This juristic opinion resulted in the regression of the status and position of women in society, to the extent that Muslim women were unable to equally enjoy the rights that were enjoyed by men. These rights included political rights and political participation, holding higher public offices, becoming witnesses, judges and leaders. Nevertheless, the other opinion which stems from this *hadith* allows women to be judges, but not leaders or heads of government.

Whatever the traditional interpretation, it must be noted that this *hadith* is classified as an *ahad* (isolated) *hadith*. This means that the narrators of this *hadith* do not exceed two persons in each generation. A *mutawatir hadith*, on the other hand, is one that is reported by an indefinite number of people in such a way that precludes the possibility of its being false.

The above *hadith* was narrated for the first time during the Battle of the Camel in which Aishah (ra) led her forces into Basrah. Her forces (which reportedly included Abu Bakra) were defeated. Many believers died in that battle.

Many modern-day commentators view this *hadith* as a fabricated *hadith*. If it had been a genuine *hadith* of the Prophet (saw), Abu Bakra would have obeyed the injunction by not going out to battle under Aishah's banner. The other explanation may be that the report was in the nature of *information*.³⁰

In the context of the Battle of the Camel, Aishah was in command of the army which included many illustrious companions of the Prophet. None of them objected to her being in command, nor did they desert her for that reason. Even Abu Bakra, the narrator of the above *hadith*, did not desert her. Had he been convinced that the Prophet had prohibited women from being *imam* (leader or head) he should have deserted Aishah as soon as he recalled this tradition. How then could it be said that a woman cannot become leader of a government when her leadership was accepted by such eminent companions of the Prophet?³¹

³⁰ Aftab Hussein (1991), p. 220.

³¹ Asghar Ali Engineer (1992), p. 77.

Those who have utilized the above-mentioned *hadith* for the suggestion that a woman should not hold leadership positions have also cited a statement attributed to Aishah as saying:

It would be more to my liking had I remained in my house and not gone on the expedition to Basrah.

If she made this statement, it could be because she regretted the loss of so many lives, including some of her nearest and dearest, and to the loss of her own prestige, and not necessarily that she was not supposed to lead.³²

It is a well-known principle in Islamic jurisprudence that an *ahad hadith* is not a basis for formulating binding rules and it is not necessary to act upon it. Hence, it is strange and illogical that this isolated tradition should have been made the basis for the ruling that a woman cannot become a head of state or be appointed as a judge, a ruling that has such serious implications on society in general as well as on women in particular.

The second *hadith* relied upon as an impediment to the appointment of women to responsible positions are the tradition which declares women as “*naqis al-‘aql wa al-din*” (defective or imperfect in reasoning and religion). As stated by those who are well versed in discriminating between authentic and forged traditions, the forgery can in most cases be detected from the subject matter of the tradition. Thus, a *hadith* cannot be accepted as authentic if:

- i) it describes what is impossible of occurrence and which is not acceptable to human reason,
- ii) it is contrary to the Qur’an,
- iii) it is contrary to historical facts.

The former Chief Justice of the Federal Shariat Court of Pakistan, Justice Aftab Hussein, referred to the view of Dr Abdul Hamid Mutawalli, who said that it is very apparent that this tradition is

³² Nabia Abbott (1942), p. 173.

one of the thousands of traditions which were forged and ascribed to the Prophet (saw) falsely, as it contains all the three defects.³³

Sources on Equality of Men and Women:

Qur'anic Verses

Surah an-Nisa' 4:34 and Surah al-Baqarah 2:282 are frequently cited to allege men's superiority over women. However, other verses which very clearly state the equality of men and women are seldom highlighted. The verses that demonstrate and emphasise the equality of Muslim men and Muslim women include Surah Ahzab 33:35 and Surah al-Taubah 9:71.

Surah Ahzab 33:35 explicitly addresses men and women without discrimination when it states to the effect that:

Verily, for men and women who have surrendered themselves unto God, and believing men and believing women, and truly devout men and truly devout women, and men and women who are true to their word, and men and women who are patient in adversity, and men and women who humble themselves (before God), and men and women who give in charity, and self-denying men and self-denying women, and men and women who are mindful of their chastity, and men and women who remember God unceasingly: for them has God readied forgiveness of sins and a mighty reward.

Surah al-Taubah 9:71 states to the effect that:

The Believers, men and women, are protectors of one another, they enjoin what is just and forbid what is evil ... On them will God pour His mercy.

Surah al-Taubah 9:71 is the final verse to be revealed on the male/female relationship. In it, men and women are said to be each other's *awliyya*—protectors or protecting friends and guardians. And it also talks about the obligations of both men and women in Islam, including enjoining what is just and forbidding what is evil. It might also be significant that while Surah an-Nisa' 4:32

³³ Aftab Hussein (1991), p. 221.

mentions “men (*rijal*)” as being *qawwamuna* over “women (*nisa'*)”, Surah al-Taubah 9:71 mentions “believing men (*mu'minun*)” and “believing women (*mu'minat*)” as being *awliyya* over each other. Revealed in 8 Hijrah towards the end of the Prophet’s life, Surah al-Taubah 9:71 sums up the spirit of equality and mutuality that the Qur’an preaches in the relationship between men and women.³⁴

To enjoin the right and forbid the wrong is primarily the duty of the State, which is in a position to discharge it effectively. The verse makes women as much protecting friends of men as men are of women. It further orders women to discharge the duty of enjoining good and forbidding wrong which can be discharged effectively by the *'ulil amr* (person in authority) who symbolises the State. The verse paves the way for women to become the repository of State authority, including the authority of the Head of the State.¹⁰

Hadith

There is a *hadith* narrated by Sayyidinna Ali (ra) and reported by Ibn 'Asakir which states to the effect that:

One who honours women is himself honorable, and one who insults women is himself lowly.

Argument between Textual Sources and Differing Interpretations:

The traditions cited against the appointment of women as head of State or in the judiciary are in conflict with the Qur’anic teachings. As stated earlier, it is observed that a *hadith* is not acceptable if it describes what is impossible to believe, the *hadith* is in conflict with the Qur’an, and it contradicts the facts of history.

The tradition that “women are imperfect in reasoning, in religion” is neither acceptable to reason nor is it in conformity with the Qur’an as well as with present-day society. This tradition has all the three elements of forgery.¹¹ If this tradition is assumed to be true, it would conflict with various injunctions which are there in the Qur’an itself and also with some other traditions. It

³⁴ The Holly Koran

¹⁰ Op. cit., p. 228.

¹¹ Op. cit., p. 221, 222.

would also conflict with some of the historical facts in the Prophet's time and that of the rightly guided Caliphs. If women are defective in reason and religion it would be necessary to restrict their power to dispose of their properties and at least make it subject to the approval and permission of their husbands or guardians. But Islam has acknowledged the absolute competence of women in this respect and has allowed her full rights of disposition over her properties. During the time of the rightful guided Caliphs, the Caliphs sought counsel from women and gave importance to their opinions. How can the human intelligence accept this tradition as authentic when the first person to believe in the Prophet (saw) was a woman, Khadijah (ra) (the Prophet's first and only wife until her death 25 years after their marriage). How can women be defective in religion when the first martyr (*syahidah*) to die in the cause of Islam was also a woman, Ummu Amir, the wife of Yasir.

The isolated tradition that a nation cannot prosper with a woman ruler contradicts the teachings of the Qur'an, as illustrated in the verses about Balqis, Queen of Sheba, as well as in the verses which demonstrate equality, particularly Surah al-Taubah 9:71. The determination of what is right and what is wrong is one of the basic duties of the leaders of a state, and here women as well as men, who are protectors of each other, have been enjoined to perform this task. How then can women be excluded from being leaders of the State, especially in a democratic government? It would also appear to conflict with another tradition of the Prophet (saw) narrated by Sayyidina Ali (ra) which says that one who honours women is himself honoured and one who insults women is himself lowly.

Problems within the Afghan Judicial System:

Judicial Corruption:

The AIHRC also monitors human rights violations within the judicial system. Individuals are often arrested and detained without cause by district attorney offices. For example, in Panjshir, the District Attorney held four people in prison for 45 days with no evidence of a crime. The AIHRC intervened and won the release of all four prisoners. Prisoners are sometimes held for a year or more before the courts issue rulings in their cases.

As well, the disposition of cases often is decided by bribes. Those who pay the bribes are released, those who do not remain in prison. The Commission has documented cases where murderers are released because they paid money. Innocent people with no money, power or access to influential people remain in prison while those who are guilty of crimes are set free.³⁵

Torture:

Torture continues to take place as a routine part of police procedures. The AIHRC has found torture to occur particularly at the investigation stage in order to extort confessions from detainees. Forced confessions are clearly in violation of the Universal Declaration of Human Rights (UDHR) and the International Covenant on Civil and Political Rights (ICCPR).

Torture was found to be especially prevalent in Herat province. For example, two brothers in Herat were imprisoned on the charge of stealing bicycles. They were then beaten and hidden from the AIHRC investigators, who eventually found them in the Herat Criminal Investigation Office. As a result of the torture, the brothers were unable to walk. The AIHRC filed complaints against the Herat Criminal Investigation Office with the Herat Deputy Governor, Chief of Police and the Ministry of the Interior. As a result of the complaint filed by the AIHRC, the Head of the Criminal Investigation Department of Herat was removed from his post.

Poor Conditions and Lack of Legal Aid:

Poor conditions within prisons are another concern of the AIHRC. Prisoners suffer from a lack of space, lack of sunlight and overcrowding. Food and clean water also are scarce. In Parwan prison, for example, water is brought in by tankers and stored in an open pool which is used for drinking and washing. Prisoners are routinely denied medical care or only treated within the prison. Female prisoners have had to give birth in detention centers.³⁶

³⁵ http://www.aihrc.org.af/mon_inv.htm

³⁶ Ibid

In 2004, the Commissions Monitoring and Investigation Unit, with cooperation from the Ministry of Justice, installed complaint boxes in both the male and female prisons in Kabul. Of 35 female prisoners, 28 submitted complaints and 136 of 623 male prisoners registered complaints. Most of the prisoners complained about treatment by police and judicial officials, about delays in their cases and about a lack of legal representation. Corruption in the judicial system is also a common complaint. To preserve the confidentiality of the complaints, the key to the complaint boxes remains with the AIHRC.³⁷

The Commission has also identified the lack of prisoner access to legal services as a major factor in their incarceration and is working with other organizations to provide defense attorneys to prisoners who cannot afford to hire their own.

The Monitoring and Investigation Unit shares the results of its monitoring with other human rights and legal aid organizations and some monitoring visits are conducted in coordination with UNAMA.

In the past year, the AIHRC has won some improvements in the prisons, including better staff behavior towards prisoners, regular food, separate facilities for child and adult prisoners and visitation rights for the families of prisoners. The AIHRC also has ended the practice of shackling prisoners ankles in the Kabul detention centers. In the womens prisons in particular, the AIHRC has successfully pressed for literacy and vocational training programs and for kindergartens for the children of women prisoners. Another major improvement is the registration of detainees at detention centres.³⁸

However, little improvement has been seen in the overall prison conditions and the handling of prisoners cases by the judicial system. In August 2003, by Presidential Decree, the Ministry of the Interior handed over the administration of prisons and jails to the Ministry of Justice. While the AIHRC supports this transfer of prison administration as a positive step in the reform of the

³⁷ http://www.aihrc.org.af/mon_inv.htm

³⁸ Ibid

prison system, the transfer process was not well planned and resulted in chaos and a cutoff of food rations.³⁹

International obligations:

Afghanistan is a party to most of the core international human rights treaties. These instruments comprise a set of standards that form the basis of the UN human rights system and are a part of international law. Afghanistan has also made a constitutional commitment to abide by international human rights treaties.

Article 7 of the Constitution of Afghanistan states: the State shall abide by the UN charter, international treaties, international conventions that Afghanistan has signed, and the Universal Declaration of Human Rights.⁴⁰

Ratifying a human rights treaty imposes a number of obligations on the State as the treaty must be implemented in law and in practice. It is usually necessary for governments to review laws, policies and practices to ensure that they are in compliance with treaty obligations. All proposed laws and policies should be checked for compliance before they are enacted and many of the treaties have reporting obligations.

As an independent national human rights institution, the AIHRC has the function of promoting the harmonization of national law and practice with international human rights instruments to which Afghanistan is a party and providing advice and information to the country's human rights treaty reporting processes.

Some of the treaties have Optional Protocols that the State party may choose to ratify. Afghanistan has signed the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography.

³⁹ http://www.aihrc.org.af/mon_inv.htm

⁴⁰ Afghan Constitution

Due to the long period of armed conflict, it has been many years since Afghanistan lodged any reports on its implementation of the treaties it has ratified. Therefore, in February 2004, the AIHRC, together with the UN Office of the High Commissioner for Human Rights (OHCHR), organized a training workshop for one week on reporting on human rights treaties. Participants came from all relevant government Ministries, the AIHRC and NGOs. The workshop was led by three experts from Geneva and was held at the Ministry of Foreign Affairs, which coordinated the event.⁴¹

Following the workshop, the Minister of Foreign Affairs committed to a six year programme of reporting to the human rights treaty bodies, at the rate of one report per year, beginning with the report on the International Covenant on Civil and Political Rights (ICCPR) by March 2005. The Governments commitment to a programme of treaty reporting was subsequently confirmed by its inclusion in the Governments Workplan published as an Annex to the Berlin Declaration.

A Working Group on treaty implementation and reporting, including the AIHRC, has begun meeting under the auspices of the Ministry of Foreign Affairs Human Rights and Womens Rights Unit.⁴²

The signing of the CEDAW Convention by the Afghan government was a big step taken by the Afghan government holding the government responsible for its CEDAW binding obligations for the advancement of women. It is hard to determine whether Afghanistan was ready for taking the step of signing a document that lays out rights for women which the society may have not been ready for. On the other hand, one may argue that the obligations have not been implemented to the country's fullest capacity in good faith. For example, would it really stir another war within Afghanistan if President Karzai were to appoint a female Supreme Court Justice? It seems unlikely. Today, there are women Parliamentarians representing every province of Afghanistan. Although there was opposition from conservative groups to avoid having women hold seats in the Parliament, women have been representing the country in such

⁴¹ http://www.aihrc.org.af/mon_inv.htm

⁴² Ibid

a capacity since the re-initiation of Parliament shortly after the fall of the Taliban. The CEDAW convention holds countries responsible for bringing women on the same platform as men on all levels including in government offices and employment. Articles 10, 11 and 13, respectively, affirm women's rights to non-discrimination in education, employment and economic and social activities. These demands are given special emphasis with regard to the situation of rural women, whose particular struggles and vital economic contributions, as noted in article 14, warrant more attention in policy planning.⁴³

Another general push of the Convention aims at creating a greater understanding of the concept of human rights, as it gives formal recognition to the influence of culture and tradition on restricting women's enjoyment of their fundamental rights. These forces take shape in stereotypes, customs and norms which give rise to the multitude of legal, political and economic constraints on the advancement of women. Noting this interrelationship, the preamble of the Convention stresses "that a change in the traditional role of men as well as the role of women in society and in the family is needed to achieve full equality of men and women". This Convention is very unique in that it recognizes the changes that have occurred in dealing with the roles of men and women in society. World statistics show that percent more women are employed than they were in 1950 and percent more women hold college degrees. Of course it is properly not the most efficient method to hold Afghanistan to international statistics in which many Western or developed countries will bring the average up drastically. It would be more relevant to compare Afghanistan to other Islamic countries or ones that share similar cultural or geographic backgrounds. Jordan for example, has the highest literacy rate in the Middle East. Fifty years ago though, they had a different situation. The Kyrgyz Republic although does not abide by Islamic Shariah law is an Islamic society and its laws and workings are highly influenced by Islamic and tribal traditions. The Aqsa Kal court for example, is an informal court usually held in rural areas of the Kyrgyz Republic. The court or committee is headed by the so called "white bearded men" whom are deemed as wise old men capable of dealing with issues in the community that need to be resolved. Much of the Kyrgyz population live in rural areas and hold strong ties to their tribal communities. These wise old men are revered as very respectful and solve family and civil issues. Nowadays, these informal courts

⁴³ CEDAW Convention

have women serving as judges or mediators as well. This has been a great step forward since traditional norms have changed over the last few decades and more and more women are educated and serving as leaders in society. The Aqsa Qal court is not unique to Kyrgyzstan; Afghanistan also has a similar informal court system in place which works fairly the same way. In the more rural provinces when disputes arise members of the community bring the issues to the white bearded courts which are informally established and not recognized as binding by law in Afghanistan. However, due to the centuries old system the people accept it is valid and usually, abide by the decisions made by the white bearded elderly men courts. In Afghanistan, such informal courts are only headed by men and females do not take a part of it. Thus, most of the time decisions are ruled in favor of the man in cases dealing with disputes between a man and a woman.

Coming back to the CEDAW convention, Article two point f of the convention states: to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women. It seems that the fact that there are no women sitting as a Supreme Court Justice is not illegal by any of the obligations Afghanistan abides by however, one can argue that the refraining from appointing a qualified female to the position of Supreme Court Justice is a non observance of the whole purpose of CEDAW and Article 2 point f. Article 2 point f requires governments to take appropriate measures to modify or abolish existing laws, regulations, customs and practices. Since it is clear thus far that there are no laws that are impeding women from serving as a Justice in the highest of courts in the Afghan Judicial System, actions need to be taken to abolish customs and practices that are inhibiting women from representation in the highest of courts.⁴⁴

Afghanistan is a member of the United Nations and party to many treaties. Some of the most important treaties that Afghanistan is party to are: “International Covenant on Economic, Social and Cultural Rights (ICESCR), International Covenant on Civil and Political Rights, Convention of the Elimination of all forms of Discrimination Against Women (CEDAW), Geneva Conventions, Refugee Convention 1951, Genocide Convention

⁴⁴ CEDAW Convention

1948, and the ICC Rome Statute 1998. Although Afghanistan has not signed the Convention for the Protection of Human Rights and Fundamental Freedoms, many of the provisions within this convention are binding on Afghanistan through other conventions.

Article 14 of the European Convention entitled Prohibition of Discrimination states: “The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.” Very similar clauses can be found in other treaties to which Afghanistan is a party. The Universal Declaration of Human Rights, although not binding, states accept the Declaration when they become a member to the United States and are held in very high regard in international customary law and have a discrimination clause similar to that of the European Convention. Moreover, the International Covenant on Civil and Political Rights Article 3 states: “The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant”.⁴⁵ Thus, Afghanistan being a party to this covenant recognizes that men and women are equal before the law. The important thing to realize is that these laws should not only be included in Afghan laws such as those within the Constitution but they must also be implemented! Recognizing the rights through enactment of laws is only an initial step to complete the task; the government must make sure it is doing in practice what it has enacted in its laws. Hamid Karzai’s recent discriminatory laws against Shia women is contradicting to its’ international obligations.

Coming back to the subject of women serving as Supreme Court Justices, Afghanistan’s international obligations which are binding upon them through its ratifications and signings of the treaties, prohibits discrimination of any sort especially, at the governmental level. To that extent, Afghanistan can not justify discrimination with baseless arguments such as that women are not religiously, qualified to serve as a Justice in the high level of the judicial system knowing that there are many qualified women Judges in the lower courts.

45

Article 5 of Afghanistan's preamble states: Observing the United Nations Charter and respecting the Universal Declaration of Human Rights". Not only is Afghanistan a member of the United Nations, its Constitution explicitly states that it is to follow the United Nations Charter. Article 2 of the Declaration states, "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

In the case of *Stec and Others v. United Kingdom*, the European Court on Human Rights found that Article 14 does not prohibit a Member State from treating groups differently in order to correct "factual inequalities" between them. Indeed, in certain circumstances a failure to attempt to correct inequality through different treatment may in itself give rise to a breach of the article.⁴⁶ A difference of treatment is, however, discriminatory if it has no objective and reasonable justification. In other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realized.

There are retirement laws in the UK which set the age 65 as a retirement age for males and 60 for women. However, the court found that because factual information provides that men are able to outwork women, this law is not discriminatory. Nevertheless, in the case of lack of women judges in Afghanistan's Supreme Court, there is no appropriate factual information or rational reasoning that can prove women should be disallowed to hold a position as a Supreme Court Justice. According to a report by Amnesty International which was based on interviews with senior male judges, the report found that one of the main reasons for women's exclusion from the Supreme Court lay in a popular belief among (male) legislators that women are not as well trained in religious matters as men. Many male judges are often former or practicing religious leaders, and since women are not allowed to participate in Islam as mullahs or religious authorities, they are often considered less qualified as judges.

46

Comparative Analysis:

In order to better understand and analyze the current situation facing women Justices in Afghanistan, it would be wise to compare Afghanistan to other countries which encompass similarities such as geographical region, cultural similarities or other Islamic countries.

In those Muslim countries where Islam is the official religion listed in the constitution, sharia is declared to be a source, or the source, of the laws. Examples include Saudi Arabia, Kuwait, Bahrain, Yemen, and the United Arab Emirates, where the governments derive their legitimacy from Islam. In Pakistan, Egypt, Iran, and Iraq, among others, it is also forbidden to enact legislation that is antithetical to Islam. Saudi Arabia employs one of the strictest interpretations of sharia. Women are not allowed to drive, are under the guardianship of male relatives at all times, and must be completely covered in public. Elsewhere, governments are much more lenient, as in the United Arab Emirates, where alcohol is tolerated. Non-Muslims are not expected to obey sharia and in most countries, they are the jurisdiction of special committees and adjunct courts under the control of the government.⁴⁷

Muslim countries where the government is declared to be secular in the constitution include Azerbaijan, Tajikistan, Chad, Somalia, and Senegal. Islamist parties run for office occasionally in these countries and sharia often influences local customs. Popular Islamist groups are often viewed as a threat by existing governments. As in Azerbaijan in the 1990s, secularism is sometimes upheld by severe government crackdowns on Islamist groups and political parties. Similar clashes have occurred in Turkey. Under the suspicion that the majority party, the Islamist Justice and Development Party, was trying to establish sharia, Turkey's chief prosecutor petitioned the Constitutional Court to bar the party from politics altogether. One of the politicians indicted, Prime Minister Recep Tayyip Erdogan, told *Newsweek*, "Turkey has achieved what people said could never be achieved--a balance between Islam, democracy, secularism and modernity." Secular Muslim countries are a minority, however, and the popularity of Islamist political parties are narrowing the gap between religion and state.

⁴⁷ <http://www.cfr.org/publication/8034/>

Afghanistan is not alone in the Islamic world in dealing with gender representation issues in the Judicial System. In fact, Afghanistan may be a step ahead given that women occupy the majority of the judicial positions in the lower courts. Women have not traditionally served as Justices in Islamic Courts because men believe that women are too emotional to apply law when hearing cases and instead, make judgments based on emotions. Judge Al-Faqueeh of Palestine states that it is ever more important to have women Justices because “Arab culture forbids talking about intimate issues between a couple.” This is precisely the same in Afghan culture. In a divorce case it would be difficult for a woman to explain that she would like a divorce due to her husband’s impotency even to a female judge and could be even impossible given the cultural restrictions to explain the issue to a male judge. Judge Al-Faqueeh goes on to say that “even if a husband strikes a wife she shouldn’t tell”. Again, saving a husband’s face even when he abuses a wife is embedded in many cultures within the Islamic world.⁴⁸ A woman in this situation in most cases would not have much social and emotional support from her community or family. Another issue in dealing with divorce cases is that male judges rule in favor of the man when it involves child support. Most women are aware of this and do not file for a divorce in fear that the Judge’s ruling will leave the woman economically unstable following a divorce.

Malaysia one of the most advanced Muslim countries is facing similar issues. There is a dual legal system in Malaysia, which is divided into the general civil courts and the Syariah Courts. The Syariah Courts have jurisdiction only over persons who are Muslims and its main area of jurisdiction is in the area of family law. For over twenty years, Malaysian women have been appointed to serve as judges in the general civil courts, with the proviso that women judges in the High Courts should only hear civil cases and not criminal cases as criminal cases that are tried in the High Courts are cases that involve capital punishment. On the other hand, women magistrates and women judges in the sessions courts can hear both civil and criminal cases, as the subordinate courts do not have jurisdiction over capital punishment. However, no woman has yet been appointed to serve as a judge in the Syariah Courts. During the past decade, Sisters in Islam (SIS) and other women’s groups have pushed for the appointment of women as judges in the Syariah Courts as well.⁴⁹

⁴⁸ Female Judges Give Women of Palestine Hope of Fair Hearings

⁴⁹ Gender Balance in Syariah Courts, Sofianni Subki

Conclusion:

The relative calm over the difficult issue of the role of Islam in the legal system has been achieved by a determined effort to avoid any direct dealings with it. This inertia is reflected in the barely visible efforts of the international community to rebuild the country's legal system. Italy, the appointed lead nation for Afghanistan's legal reconstruction, has delegated this task to the prestigious and well-known International Development Law Organisation [IDLO]. In turn, IDLO has established a branch office in Kabul and has embarked on the task of assembling a complete of Afghan laws past and present. Various commissions constituted under the provisions of the Bonn Agreement are dealing with legal issues but thus far only few visible manifestations of this work have emerged.

Through my research, I found that Islamic Shariah law and Afghan law do not in any way prohibit women serving as judges at any level. The limitation comes with certain interpretations of Hadith that women are not able to become religious leaders or mullahs. However, there is not a requirement to be a religious cleric in order to become a Supreme Court Justice. The requirements to become a Supreme Court Justice are clearly indicated in the Afghan Constitution and the Law of the Organization and Jurisdiction of the Courts of the Judiciary of the Islamic Republic of Afghanistan. It is my contention that the Afghan government led by Hamid Karzai which is patriarchal in nature and holds a strongly conservative Wolesi Jirga Council which makes it difficult for the appointment of women judges in the Afghan Supreme Court. It is not a question of legality for women to have equality within the Afghan judicial system through Afghan or Islamic law, it is one of culture. There exist women who are qualified enough to interpret Shariah law and abide by it thereof, the enrollment and graduation of women from the Shariah law department at Kabul University is evidence to this.

Perhaps it is reasonable to note that three decades of war have devastated the Afghan society, including its judicial system. As Afghanistan attempts to rise from the rubbles of

three decades of war, so does its judiciary system. Women are at a disadvantageous position at this point in time because most of the fighters in the last three decades were men. Men hold enormous economic, social, political, and legal powers which women do not. It is worth noting that maybe, Afghanistan is not in a terrible position when it comes to women's representation in the judicial system. As mentioned above although, not in the highest courts, women hold the most Justice positions in Afghanistan. This may be many steps ahead of some other Islamic countries that are only recently accepting women as judges even, in the lower systems. Nagwa Kamal Farid for example, is the first woman appointed to the sharia court system in Sudan. It wasn't until 2003 that Egypt appointed its first woman judge.⁵⁰ As Afghanistan moves towards normalization, it should be easier for women to overcome social, economic, and political barriers. The Judiciary System will play an important role in helping women to gain their rightful position, including becoming judges on the National Supreme Court.

History shows that when civil society strives to bring about a change, change is eventually made. Drastic changes in a country are many times made through an active civil society through civic groups such as non profit organizations from political agendas to human rights organizations. In my opinion, a strong women's rights organization needs to couple with an international organization which has more resources which can guide the local organization in bringing pressure to Karzai's government to nominate a woman Justice to the Supreme Court. The local organization then, needs to gain support at the parliamentary level so that they will accept Karzai's nomination. Of course, a great step would be to have attention on the nomination which may not be successful initially but will eventually, become accepted as more and more organizations lobby parliament for support. The whole concept is to normalize the idea that women can serve as Justices and to have these organizations counter the very weak arguments of the ultra conservatives by bringing evidence from Shariah Law against the argument that women are not Islamically permitted to serve as women judges or the even weaker argument that women can not serve properly when she is menstruating.

⁵⁰ Islamic Law and Society in the Sudan, Fluehr-Lobban Carolyn

Afghanistan has improved drastically over the last few years in handling discrimination issues and advancing women's rights. Afghanistan is party to many treaties and conventions which show its commitment to universal principles of law however; much more needs to be done in implementing those international obligations. These actions must be taken from the Afghan government and civic organizations together.

With an untrained, inexperienced judiciary and continuing uncertainty over the sources and application of law, there are very real fears regarding the rule of law and access to justice in Afghanistan. Given recent decisions by the Supreme Court and statements by individual judges, including Mr. Shinwari, reflecting a lack of commitment to women's equality, the rights of women in particular risk being further undermined. On 24 November 2004, the Afghan Civil Society Forum, whose partners include the Afghan Women's Network, an umbrella group of women's organizations in Afghanistan, issued recommendations to President Karzai in an effort to open dialogue between the first elected president and the people on the future of Afghanistan. Among the prime requests was for action to establish security and to enforce the rule of law, For the rule of law to apply, the Supreme Court must be constituted and operate in accordance with the provisions of the Afghan Constitution.

It is clear that the war in Afghanistan has not been drastically successful in protecting and promoting the human rights of women. Sadly, political agendas always trump human right as was evident during the London conference on Afghanistan this year when ministers and officials of the UN, EU, and Nato all remained silent on the issue of women. There were three women representatives including Hilary Clinton who outlined the "The Women's Action Plan for Afghanistan".⁵¹

This plan lists a range of suggestions to improve the security of women, and accessible services for women including medical care and education. However, introducing new programs is ineffectual if the target population is too scared to come out of the home. Fear of violence and extremist attacks on women remain a huge challenge.

⁵¹ <http://www.socialistworker.co.uk/art.php?id=21014>

The resurgence of Taliban ideology and strongholds has resulted in acid attacks on girls who attempt to go to school and rebel Northern Alliance groups regularly use rape of women and children as a an instrument of war to suppress rebellion. As a result the UN Committee on CEDAW voiced concern on “the absence of clear strategies to protect women’s rights in the process of the discussions leading to negotiations with representatives of the Taliban” during the conference.⁵²

Recommendations:

By ratifying the Convention on the Elimination of all forms of Discrimination against Women (CEDAW), the Government of Afghanistan has an obligation to ensure that laws and policies are free from gender-based discriminatory provisions. It has been observed (with the enactment of the Shia Personal Status Law (SPSL)) that the Parliament is likely to continue enacting laws that could violate the policy of equality and non discrimination under the Constitution. Women’s organizations and civil society groups should be consulted in the review and development of national laws and policies. As a matter of procedure, all laws and policies should be subjected to gender assessment before they are adopted, and the capacity of the Parliament for such purpose should be built. It should set up a mechanism to undertake a gender assessment of all legislative proposals and such mechanism should function in close consultation with MOWA and gender advocates.⁵³

The incidence of violence against women, especially physical violence such as murder, repeated battering, and sexual abuse, continues to be pervasive. A fragile justice system that is incapable of providing effective response contributes to the perpetration of this problem. Existing policy debates around women's political participation tend to overshadow the more urgent need to protect women from violence. The UN Special Rapporteur should pay attention to this reality and systematically raise the issue at the proper level to find swift solutions, including the development of capacities among the pillars of the justice system, health, and educational institutions in order to prevent, protect and secure justice for Afghan women who experience violence.

⁵² CEDAW Conference, 2010

⁵³ Dubai’s Women Conference

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 realization 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 interfamilial, 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. 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.

In order to change the mentality that women may not serve as Supreme Court Justices the best route for the President is to initiate a quota system as has been done at the Parliamentary level. The problem in Afghanistan does not lie in the laws, the problem is evident in cultural and social restrictions which marginalizes women from all sectors of society.

