Feminist Legal Theory as a Way to Explain the Lack of Progress of Women’s Rights in Afghanistan: The Need for a State Strength Approach

Isaac Kfir, Syracuse University
Feminist Legal Theory and the need for 'State Strength' Approach when Addressing the Lack of Progress of Women’s rights in Afghanistan

Feminist Legal Theory as a Way to Explain the Lack of Progress of Women’s Rights in Afghanistan: The Need for a State Strength Approach

ISAAC KFIR

Do not cite or copy. All rights reserved.

ABSTRACT

Cultural and religious practices are critical to explaining Afghanistan’s dreadful reputation concerning the preservation, protection, and promotion of women’s rights. Those advocating misogynistic practices assert that the calls for reforms challenge their religion and culture. Additionally, they also argue that women’s issues exist within the private realm. Accordingly, they assert that such reforms are not vital to the state and go beyond the established limits of state authority. Building on feminist legal theory, which distinguishes between the public and private spheres, I argue in Afghanistan misogynistic and discriminatory practices stem from contrived cultural and religious norms. Using the notion of state strength, this paper advances the idea that the discourses countering the lack of official action in ending discrimination must emphasize that unless women’s role in contemporary Afghan society is strengthened, the state will continue to remain weak.

1 The opinions and conclusions of this paper, as well as its faults, are solely those of the author. I wish to thank Professors Lauryn Gouldin and Todd Berger, Syracuse College of Law; Professor Corri Zoli, Institute for National Security and Counterterrorism (INSCT); and Professor Renee de Nevers, Maxwell School of Public Administration, Syracuse University for helpful comments and conversations. Special thanks to Maddy Dwertman for her wonderful and careful editorial assistance.

* Isaac Kfir is a Visiting Assistant Professor of International Relations and Law at Syracuse University where he currently teaches International Human Rights Law, Post-Conflict Reconstruction and the Rule of Law, and International Security. He is a Research Associate at the Institute for National Security and Counterterrorism (INSCT), Syracuse University. Isaac received his Ph.D. in International Relations from the London School of Economics (1999) and holds a Post-Graduate Diploma in Law (PGDL) and Bar Vocational Certificate (BVC) from BPP Law School (2001). He was also a member of Inner Temple.

2 This essay is dedicated to Fakhra Younas. I never met you, but your story has inspired me.
Feminist Legal Theory and the need for 'State Strength' Approach when Addressing the Lack of Progress of Women’s rights in Afghanistan

Table of Contents

INTRODUCTION ................................................................................................................................. 1

I. STATE STRENGTH ......................................................................................................................... 11

II. FEMINISM, GENDER DISCRIMINATION & FEMINIST LEGAL THEORY ........................................... 14
   A. INTERNATIONAL LAW AND FEMINIST LEGAL THEORY: THE PRIVATE-PUBLIC DIVIDE ................. 18

III. ISLAM, WOMEN’S RIGHTS AND ISLAMISM ................................................................................. 22
   A. FAMILY LAW AND WOMEN .................................................................................................... 25
      1. Family, Tribal Practices and Patriarchy ................................................................................. 28
   B. ISLAMISM: ITS ROLE AND IMPACT ON WOMEN’S RIGHTS .................................................. 31

IV. AFGHANISTAN AND WOMEN ..................................................................................................... 35
   A. AFGHAN WOMEN IN THE POST-9/11 PERIOD ....................................................................... 39
      1. The Afghan Constitution, Women and the Supreme Court .................................................. 42
      2. The Afghan Ministry of Women’s Affairs (MoWA) ................................................................. 47
      3. The Law on Elimination of Violence against Women (EVAW) ............................................. 50
   B. NON-GOVERNMENTAL ORGANIZATIONS AND AFGHAN WOMEN: RAWA .................. 53

CONCLUSION ...................................................................................................................................... 55
INTRODUCTION

In 2011, the Thompson Reuters Foundation published a survey identifying the worst five countries in the world for women to live in. The worst was Afghanistan, followed by the Democratic Republic of the Congo (DRC), Pakistan, India and Somalia. Afghanistan’s ranking can be attributed to high incidence of targeted violence against female public officials, appalling health care facilities for women and widespread violence against women. Many in the non-western world condemn surveys such as that conducted by the Thompson Reuters Foundation, arguing that they represent a poor grasp of non-western societies and a deep misunderstanding of cultural norms. Non-western feminists extend the criticism, maintaining that the images produced by such surveys promulgate the image of women in Muslim societies as either passive victims or brave opponents. Professor Lila Abu-Lughod captured this tension: “[A]nthropologists, feminists, or concerned citizens […] should be wary of taking on the mantles of those 19th century Christian missionary women who devoted their lives to saving their Muslim sisters.” This may explain why over the last few years the non-western feminist movement has opted to pursue its agenda of empowering women through indigenous cultural norms, ensuring that the campaign for equality in these societies has taken a different route.

---

2 Id. See also, UNAMA, A Long Way to Go: Implementation of the Elimination of Violence against Women Law in Afghanistan (2013).
3 Lila Abu-Lughod discusses some of these issues in her article Do Muslim Women Really Need Saving? Anthropological Reflections on Cultural Relativism and Others, 104 AM. ANTHROPOLOGIST 783 (2002) (challenging and rejecting the view that Muslim women need to be saved).
4 See generally Lizzy Davis, Fawzia Koofi Targets Afghan Presidency as Fight for Women’s Rights Continues, GUARDIAN, Feb. 18, 2012, at 15; Jeffrey Gettleman, For Woman In Sudan, No Escape From Misery, N.Y. TIMES, Feb. 20, 2012, at A4; Krista Hunt, The Strategic Co-optation of Women’s Rights, 4 INT’L FEMINIST J. POL. 116 (2002) (arguing that the increased interest in women’s issue in relation to Afghanistan and other places stems for the desire to further legitimize the ‘war on terror’).
5 Abu-Lughod also argues: “A first step in hearing…[women’s] wide message is to break with the language of alien cultures, whether to understand or eliminate them. Missionary work and colonial feminism belong in the past. Our task is to critically explore what we might do to help create a world in which those poor Afghan women, for whom “the hearts of those in the civilized world break,” can have safety and decent lives.” Abu-Lughod, supra note 3, at 789-90.
6 See, e.g., Melissa Steyn, A New Agenda: Restructuring Feminism in South Africa, 21 WOMEN’S STUD. INT’L F. 41 (1998) (highlighting how the feminist movement in South Africa has sought to move away from the feminist movement of the apartheid era and adopt a more inclusive and diverse agenda).
7 See, e.g., Ruth Bader Ginsburg, Gender and the Constitution, 44 U. CIN. L. REV. 1 (1975) (on the law as a tool to sustain traditional views and as a mechanism to foster social change); Ala Htun & S. Laurel Weldon, State Power, Religion, and Women’s Rights: A Comparative Analysis of Family Law, 18 IND. J. GLOBAL LEGAL STUD. 145 (2011) (taking a cross-national approach to family law to highlight how some countries have resisted reform due to alleged conflict with inherited legal traditions); Muna Ndulo, African Customary Law, Customs and Women’s Rights, 18 IND. J. GLOBAL LEGAL STUD. 87 (2011) (explaining the need for African courts to reform African customary law to end discriminatory practices); Astri Suhrke, Reconstruction as Modernisation: The “Post
Afghanistan, which is transitioning out of conflict, highlights the difficulty of balancing cultural and religious norms in a traditional society in which religion is fundamental while adhering to basic human rights. Given the large foreign presence directing Afghan reconstruction—coupled with heightened expectations with respect to women issues—donors expect Afghans to share their conception of gender equality and condemn the manner in which the Taliban has treated and continues to treat women. And yet, despite a long international engagement in Afghanistan, the country remains one of the worst countries for women to live in because the status of women continues to rest on misogynist cultural views controlled by Afghan men. In other words, Afghan men decide what rights and power Afghan women will and should have. Consequently, when it comes to empowerment, Afghan women face difficulties at every level and within every 

Conflict” Project in Afghanistan, 28 THIRD WORLD Q. 1291 (2007) (arguing that post-conflict reconstruction in Afghanistan contains a radical element because modernization has led to tensions associated with social change).

Huma Ahmed-Ghosh writes that her impression, based on conversations with Afghan women, is that Afghan women desire not western human rights but rights that lie “…within the framework of Islam and not as a cultural imposition from the West.” She adds, “Afghan women felt that the U.S. was pushing them to undermine Islam.” Huma Ahmed-Ghosh, Voices of Afghan Women: Women’s Rights, Human Rights, and Culture, 27 T. JEFFERSON L. REV. 27, 29 (2004-2005).

Laura Bush, Remember Afghanistan’s Women WASH. POST May 19, 2012, at A.17


See, e.g., Valentine M. Moghadam, Patriarchy in Transition: Women and the Changing Family in the Middle East, 35 J. COMP. FAMILY STUD. 137 (2004) (declaring that the “Arab-Islamic family and its concomitants—rigid sex roles, women’s legal status as minors, the prerogatives of fathers and husbands, high fertility—have been challenged by socioeconomic developments (industrialization, the expansion of the urban labor market, and education) and political action (state legal reform and women’s movement)’’); Lynne L. Manganaro & Nicholas O. Alozie, Gender Role Attitudes: Who Supports Expanded Rights for Women in Afghanistan? 64 SEX ROLES 516 (2011) (examining how men and women view gender roles in Afghanistan and concluding that men remain more conservative than women even though education and urban life help counter such sentiments). Jawid Omid, Violence against Women still Prevalent in Post-Taliban Afghanistan, XINHUA NEWS, December 16, 2013, (page n/a).

facet of Afghan society. Many Afghan women must remain dependent on male relatives even though the Afghan constitution demands equal rights in accordance with international human rights law, which means that their ability to determine their own present and future is greatly curtailed, while their basic fundamental rights are ignored.

September 11 heightened interest in Islam, urging Muslims to reflect upon and question many practices and norms prevalent in their societies as many sought to understand why nineteen individuals were willing to cause such destruction. This introspection has led to some legislative reforms, specifically with respect to women’s role, position and rights in public spaces in many Muslim societies. Substantial literature exists on the interaction between religion, culture and women, as well as on Muslim women in contemporary Muslim society. The literature focuses on such issues as the need to reject certain misogynistic

---

15 Toseef Azid, Rana Ejaz Ali Khan & Adnan M.S. Alamasi, Labor Force Participation of Married Women in Punjab (Pakistan), 37 Int’l J. Soc. Econ. 592 (2010) (arguing that labor participation in Pakistan is low because women’s access to the labor market is determined by how society defines their role).

16 Female labor participation in 2009-2010 was around 14.4 percent compared to 70 percent male labor participation. Id. at 592.


19 Over the last few years, women’s representation in Muslim states has increased and women-based NGOs have become more vocal and effective in gaining certain rights for their constituents. This trend is evidenced, for example, in the changing role, presence and advocacy of women’s groups in Saudi Arabia. Hanan Al-Ahmadi of the Institute of Public Administration in Riyadh, while recognizing the need for more work, has noted the advances made by Saudi women over the past 10 years, particularly their increased participation in decision-making processes in the public and private sectors. Hanan Al-Ahmadi, Challenges Facing Women Leaders in Saudi Arabia, 14 Human Resources Dev. Int’l 149 (2011). However, as Chamblee argues, the UN and human rights organizations have generally “…kept a cautious distance from Islamic religious and cultural matters by mentioning the problems, but refusing to address them with anything more than study.” L. Elizabeth Chamblee, Rhetoric or Rights: When Culture and Religion Bar Girls’ Right to Education, 44 Va. J. Int’l L. 1073, 1104 (2003-2004).

practices,\textsuperscript{21} women and humanitarianism,\textsuperscript{22} women and conflict,\textsuperscript{23} women in post-conflict settings.\textsuperscript{24} In recognizing this and drawing from the aforementioned research, this paper contributes to the discourse by arguing that opponents have moved women’s rights issues into the “private sphere,”\textsuperscript{25} ensuring that gender is constructed according to social, religious and cultural norms\textsuperscript{26} and making the state less likely to address restrictions to women’s participation in the public sphere. Thus, for example when the Afghan Ulema Council decreed that men and women should not mix in the workplace, it not only imposed restrictions on women’s employability but also limited opportunities for women, as not many people would wish to challenge the Council.\textsuperscript{27} Shaheen Sardar Ali captures this challenge:

By applying the Islamic paradigm of equality of human dignity and worth, and requiring ‘those in authority’ i.e., men and the State to accept responsibility for fulfilling the material needs of women, children and other disadvantaged sections of society in their charge, and provide them with access and control over resources, a move towards substantive as opposed to mere formal equality for all may be possible.\textsuperscript{28}

Ultimately, the Afghan state, whose institutions men dominate, is either able to ignore legal and moral obligations towards women or simply impose values and norms detrimental to women’s rights.\textsuperscript{29} This paper, after reviewing the various challenges faced by Afghan women and reviewing the current situation in Afghanistan, therefore suggests that by reframing the case for women’s rights

\begin{thebibliography}{99}
\bibitem{24} \textsc{Faegheh Shirazi (ed.), Muslim Women in War and Crisis: Representation and Reality} (2010); \textsc{Navnita Chadha Behera (ed.), Gender, Conflict and Migration} (2006).
\bibitem{25} See \textit{infra} Part II.
\bibitem{28} \textsc{Shaheen Sardar Ali, Gender and Human Rights in Islam and International Law: Equal Before Allah, Unequal Before Men?} 88 (2000).
\bibitem{29} Dupree, \textit{supra} note 26, at 978.
\end{thebibliography}
through the language of ‘state strength’ would help challenge those opposing women’s rights and women empowerment. I argue that Afghanistan will remain a perpetually weak state until it not only recognizes gender equality but also actively promotes it. Notably, the paper assumes neither that Afghan women need external actors to “save” them nor that Islam—when properly understood—is the cause of discriminatory practices. Rather, it recognizes:

When the state is incapable or unwilling to represent the interests of members of society, the importance of family and kinship relations is inflated. Consequently, any challenges to patriarchal authority in the domestic sphere—including but not limited to challenges to the use of violence—can be construed as threatening to the family as an institution. This, in turn, lends itself to the idea that increasing the rights of women would corrode and menace the family, and, by extension, the social order. As the irony comes full circle, many states are willing to champion or accept the notion that women’s rights—and those who advocate them—are threatening to society in order to shift critical attention from their own failings or to justify their own refusal to reform family and criminal laws.

The argument rests on four pillars. First, Islam is not the reason why women in Afghanistan endure discriminatory practices. Rather, discrimination results from the presence of contrived cultural and religious norms that arise from misreading, misunderstanding or manipulation of the Qur’an. Accordingly, in claiming the

30 A good example of this is the case of Azra Jafari, the mayor of the town of Nili in Daykundi province. Initially, the cleric opposed Jafari because he felt that such a position was inappropriate for a woman. However, once he saw the changes that Jafari began implementing in the town, he changed his opinion and supported her. Golnar Motevalli, Afghanistan’s First Female Mayor Proves Critics Wrong, GUARDIAN (Feb. 24, 2013), http://www.guardian.co.uk/world/2013/feb/24/afghanistan-first-female-mayor.

31 Within the legal feminist movement, there is increasing opposition or distaste towards the idea that non-western women need to be saved by their western counterparts. See e.g. Abu-Lughod, supra note 3; Ahmed-Ghosh, supra note 8; Engle, supra note 22.


34 Shaheen Sardar Ali states: “A book of Divine Revelation such as the Qur’an coming together over twenty-three years, is by its very nature open to varying interpretations.” ALL, supra note 28, at 87. See also Wael B. Hallaq, Was the Gate of Ijtihad Closed? 16 INT’L J. MIDDLE E. STUD. 3 (1984) (arguing that the Islamic jurists that claimed that the gates of Ijtihad had been closed were marginalized and came to exist outside of Sunnism).
existence of contrived cultural and religious practices.\textsuperscript{35} it is argued that these norms are artificial, developed and sustained for specific reasons: maintain traditional authority or sustain an anachronistic system. By inventing norms and presenting them as cultural or religious, often in reference to idyllic community, their proponents are able to impose social restrictions.\textsuperscript{36} Additionally, because it is no longer acceptable or permissible to treat Afghan women as second-class citizens,\textsuperscript{37} opponents of women’s empowerment argue that these women’s rights challenge cultural and religious norms and therefore these rights can and should be resisted.\textsuperscript{38} Second, the cause of discrimination, from a religious standpoint, stems from a misogynistic orthopraxy associated with Islamism,\textsuperscript{39} which amounts to a pervasion of Islamic law.\textsuperscript{40} The third pillar posits that there has been limited...
state action because opponents of reform have successfully placed the discourse on women’s rights within the “private” realm, a space considered beyond the reach of government action—and identified women’s rights with the affairs of the family. When for example there are attempts in Afghanistan to introduce legislation or measures that empower or protect women, they are portrayed as examples of a pro-western government trying to encroach into the private realm, which many Afghans view as sacrosanct. The effect of such castigation is that those engaging in honor killings or abusing women are able to escape or avoid prosecution. Additionally, the Afghan government itself is weak, making it dependent on the support of conservatives and Islamists leading it to adopt a conservative agenda while asserting that international demands for reforms are rooted in an interventionist anti-Islamic western culture. The final pillar rests on the idea that using state strength, which resonates with the polysemous

terms of the sharia—treat women as second-class citizens and place them under men’s domination?” Mir-Hosseini, Muslim Women’s Quest for Equality: Between Islamic Law and Feminism, 32 CRITICAL INQUIRY 629 (2006).

41 See Hilary Charlesworth, Christine Chinkin & Shelley Wright, Feminist Approaches to International Law, 85 AM J. INT’L L. 613 (1991) (distinguishing between private and public with respect to international law, and arguing that such a distinction is detrimental to women’s rights). Hanan Al-Ahmadi’s empirical study of 160 Saudi women leaders, for example, highlights that structural issues and a lack of investment rather than Islam undermine the promotion of women in Saudi Arabia. Al-Ahmadi, supra note 19.

42 Jessica Pfisterer, Letting the Pillar of Society Fall: Failing Health Care and Maternal Mortality in Afghanistan, 12 GEO. J. GENDER & L. 61 (2011) (highlighting that the high maternal mortality rate in Afghanistan is linked to the status of women in the family and society. The implication being that the Afghan government cannot compel Afghans to ensure that women receive appropriate health care).

43 The private (family) realm is sacred because so much of Afghan life is dependent on honor, which means that if it is sullied or defamed, it requires an act of violence to restore the loss honor. THOMAS J. BARFIELD, AFGHANISTAN: A CULTURAL AND POLITICAL HISTORY (2010);

44 In a recent case, an Afghan judge allowed three individuals convicted of torturing a child bride—Sahar Gul—to go free claiming that there was no evidence to show abuse, even though Gul by the end of her ordeal could not walk and needed serious medical attention. Emma Graham-Harrison, Afghan Judge Free Three Jailed for the Torture of Child Bride Sahar Gul, GUARDIAN Jul. 11, 2013, http://www.theguardian.com/world/2013/jul/11/afghan-judges-free-sahar-guls-torturers.

45 In March 2012, for example, the Afghan Ulema Council issued a statement declaring, “[m]en are fundamental and women are secondary.” The statement appeared on the website of the President of Afghanistan, Hamid Karzai, suggesting that he supports it. The statement led Shukria Barakzai, a female lawmaker from Kabul to assert: “The government thinks that 2014 is nearing and the foreigners are leaving Afghanistan and they want to reach out to the Taliban with such statements.” Charles Levinson, Women’s Rights Face Afghan Setback, WALL ST. J., Mar. 8, 2006, at 10.

46 When discussing the case of the Quran burning and the killing of 16 Afghan civilians by a U.S. soldier, Hafez Abdul Qayoom, a member of the Afghan Ulema Council, stated: “To Muslims, and especially to Afghans, religion is much higher a concern than civilian or human casualties…. When something happens to their religion, they are much more sensitive and have much stronger reaction to it.” Rod Nordland, In Reactions to Two Incidents, a U.S.-Afghan Disconnect, N.Y. TIMES, Mar. 15, 2012, at 4.

47 See infra Part I.
concept of national security,48 allows one to challenge opponents of reform.49 Notably, the paper concludes by arguing that by empowering women Afghanistan would become a strong, stable state, which is the ultimate purpose of national security, which “encompasses the decisions and actions deemed imperative to protect domestic core values from external threats.”50 A successful campaign for women’s rights must therefore rely less on international law, which has little appeal outside high society in Afghanistan and focus instead on the Afghan constitution and shari‘a, both of which have the means to end discriminatory practices.51 An important element in this conclusion is the assumption that the state and its key organs (including key officials) are not hostile towards the empowerment of women, it is simply that they weak, fearful of being overthrown, and are beholden to conservative forces.

Part I reviews the general tenets of state strength using the concepts of failed, failing and weak states, as well as that of national security. The process of defining what constitutes a “failed” and a “strong” state is an integral to the argument because a strong state has a government capable of providing basic security and services to its entire people and also has the ability to prevent a minority from imposing its will on society.

Part II examines feminist legal theory, focusing on the use of the public-private divide as an analytical tool to understand the position of women in Afghanistan and why the Afghan state is failing to abide by its constitutional and international commitments.52 As a weak state, the Afghan government depends on local powerbrokers and conservative elements naturally hostile towards the empowerment of women. In Afghanistan, males dominate the state and its institutions. Women’s participation in certain spheres is dependent on men defining those spheres as public. For example, membership in the Wolesi Jirga (Council of People), a public body, is accepted, but this same degree of

48 P.G. Bock & Morton Berkowitz, The Emerging Field of National Security, 19 WORLD POL., 122 (1966) (arguing that national security is difficult to define due to institutional proliferation, the technical nature of problems associated with national security and scholars tackling separate problem in incongruous ways).
49 Ian Boxill draws a link between tourism and national security, highlighting how insecurity undermines tourism, a vital source of income for some states. Boxill is undoubtedly correct in his conclusion that when it comes to national security, there is a need for a holistic approach. Ian Boxill, Linking Tourism Security to National Security, 4 WORLDWIDE HOSPITALITY & TOURISM THEMES 26 (2012).
51 In 2001, the Bangladeshi high court ruled that religious edicts that prevent women from voting are illegal. The country’s election commission also announced that it would consider disqualifying candidates who opposed equal political rights. Lipika Pelham, Support for Bangladesh Female Franchise, BBC NEWS (May 21, 2001), http://news.bbc.co.uk/2/hi/south_asia/1345020.stm.
52 See, e.g., Cheshmak Farhoumand-Sims, CEDAW and Afghanistan, 11 J. INT’L WOMEN STUD. 136, 142 (2009) (recounting the opposition to the CEDAW in Afghanistan in 2004 and discussing “a clear campaign to discredit the Convention as ‘Western,’ ‘un-Islamic,’ and incompatible with Afghan culture and religion. This was evident in the training sessions colleagues and I led in the Spring of 2003 in Kabul and Jalalabad, when questions from the participants pointed to incorrect information about the Convention being spread by Imams in communities and the media.”).
acceptance does not permeate education or economic empowerment, which are defined as private issues existing within the purview of the patriarchal family. In other words, female participation in certain activities or institutions requires male approval; as opponents increasingly claim, female participation is not prima facie a basic right, even though gender discrimination is prohibited under the Afghan Constitution. That is, even though discrimination is prohibited under the constitution, it is justified because reform measures cannot challenge social or religious practices. Thus, if one is to accept the premise that the Afghan government wishes to end discriminatory practices against women, as evidenced by its signing of various international human rights conventions concerning women, then it follows that the government’s lack of widespread authority facilitates its decision not to use valuable resources to promote a policy it knows could bring about its downfall.

Part III provides a schematic look at Islam and its relationship with women. Its aim is to dispel the notion that Islam is the cause for the subordination of women in Afghanistan. On the contrary, the cause of discriminatory practices and the subjugation of women in Afghanistan is Islamism—the politicization of Islam. A core assumption is that contemporary Islamists engage in a process of forcing upon society their interpretation of Islam and its attendant cultural and tribal practices to the detriment of women, which is also when the international community steps in. The section also reviews the development of Muslim

---

54 See infra Part IV.A.1.
55 The religious argument is especially important because under the repugnancy clause, any law that the Courts deem to offend Islam is invalid as stated in art. 3 “No law shall contravene the tenets and provisions of the holy religion of Islam in Afghanistan.” CONST. OF THE ISLAMIC REP. OF AFGHANISTAN, art. 3 (2004).
56 It might be useful to note here that King Amanullah was arguably overthrown because conservatives were unhappy with his campaign to empower women. Isobel Coleman, *Beyond the Burqa: The Future of Afghan Women’s Rights*, 5 GEORGETOWN J. INT’L AFF. 57, 58 (2004).
57 Islam ensures that Muslim societies largely resemble one another because of the adherence to Islam. ERNEST GELLNER, *MUSLIM SOCIETY* (1991). Khaled A. Beydoun, writing about Saudi Arabia, argues that the interpretation of Islam and the dominance of Wahhabism rather than Islam prevents women from asserting their position in Saudi society: “To say that Wahhabism is the ‘established or entangled’ sect in Saudi Arabia is a severe understatement. Rather, it is the prism by which law and policy is shaped and ratified; a prism that thoroughly perceives the political participation of women as unholy, and wholly abhorrent.” Khaled A. Beydoun, *Fast Tracking Women into Parliamentary Seats in the Arab World*, 17 SW. J. INT’L L. 82, 82 (2011).
59 L. Elizabeth Chamblee argues that only when Islamists take control of a political system does the international community becomes involved, arguably because of concerns relating to security. At the same time, she notes that when the regime introduces and implements legislation that greatly undermines women’s rights the
Feminism under which Muslim women advocate for their rights through the Qur’an. This type of advocacy sometimes places Muslim women on a collision course with their western counterparts. Nevertheless, the views of Muslim feminists play an important role in the empowerment of women and are at times best suited to challenge their oppressors.

Part IV, composed of several sub-sections, offers an examination of the position of women in Afghan society. A historical approach shows that Afghan women have enjoyed certain rights—many of which were public—that contemporary Afghan society identifies as existing in the private realm. The pervasive sense of insecurity that befell Afghanistan in the 1970s and enabled men to deny women equal rights by using contrived religious and cultural norms helps to explain this transference of rights. It is noteworthy that Afghan women serve as the barometer of a man’s honor. In other words, a man’s honor is dependent on the “purity” of his female relation. The section proceeds to examine how Afghan women have fared under the newly adopted constitution and the how the Supreme Court has implemented the constitution with respect to women. The final two subsections review the role of the Afghan Ministry of Women and Afghan NGOs, both of which endeavor to promote women’s rights. These two areas are important because the Ministry clearly operates in the public space while the NGO sector negotiates between public and private spaces. Looking at the Ministry and the NGO sector facilitates a closer examination of the role of Afghan feminism; it mirrors current debates about feminism in the Muslim World that remain bifurcated between Muslim Feminism, which follows traditional liberal feminism, and Islamic Feminism, which argues for a Quranic approach to gender issues. While some advocate for an Islamic approach to women’s rights, others embrace international human rights norms as their mantra. Rahela Hashim Sidiqi, a senior adviser at Afghanistan’s civil service commission summed up the challenge by noting that Afghan feminism is not about overturning cultural norms, but rather about humanizing it—“If it shows respect international community accepts them under the guise of culture. Chamblee, supra note 19, at 1075-76. See, also, Hunt, supra note 4.

60 See infra Part II.

61 This is where Article 22 of the Constitution is useful because it prohibits discrimination against any Afghan citizen and emphasizes that every Afghan citizen—man and woman—has equal rights before the law. CONST. OF THE ISLAMIC REP. OF AFGHANISTAN, art. 22 (2004). Nusrat Choudhury further argues that the Afghan Constitution, through Article 22 and Article 7, which refers to Afghanistan international obligations, allows secular Afghan women advocates to call on the parliament to adopt legislation in line with the government’s obligation under Article 7. Conversely, Muslim feminists may use the Constitution’s Islamic provisions to call on Parliament to adopt legislation that provides women with rights as decreed by Islam. Nusrat Choudhury, Constrained Spaces for Islamic Feminism: Women’s Rights and the 2004 Constitution of Afghanistan, 19 YALE J.L. & FEMINISM 155, 175-176 (2007-2008).

62 See infra Part IV.


64 See infra Part II.
to wear a scarf... I wear a scarf.” Finally, the importance of the Afghan Ministry of Women and of the Afghan NGO sector has increased because there has been greater attention afforded to women’s issues. This may explain why the Taliban targets women working for these institutions. The Taliban has come to recognize that many Afghans see the value of incorporating women into the public sphere so they now seek to undermine the process of women’s empowerment by targeting women, schools and health facilities. It would therefore serve as a testament to the strength of the state if it withstands the assault on the rights of Afghan women. Thus, the aim of these two sub-sections is to highlight through a short narrative and anecdotal evidence the limitations and successes of the Afghan Ministry of Women and of the Afghan NGO sector in promoting women’s rights.

I. STATE STRENGTH

The state is a central feature in international relations and security studies. State strength or state capacity refers to the idea that states acquire security in an anarchical world through power and wealth. Thus, state strength is

---


66 Reportedly, from 2011 to 2012 there was a 12 percent reduction in civilian casualties overall, but a 20 percent increase in injuries to women and girls. The most striking statistic was the 700 percent increase in the number of government employees targeted by the Taliban. Golnar Motevalli, Taliban Targeting Afghan Women and Government Workers, UN Report Finds, GUARDIAN (Feb. 19, 2013), http://www.guardian.co.uk/world/2013/feb/19/taliban-targeting-women-un-report. See also Anup Kaphle, List of Prominent Afghan Officials Assassinated (and Targeted) in 2012, WASH. POST (Dec. 10, 2012), http://www.washingtonpost.com/blogs/worldviews/wp/2012/12/10/list-of-prominent-afghan-officials-assassinated-and-targeted-in-2012/.


69 Suicide Bombers Target Hospital, Markets, Killing 38, Wounding 100, NANAIMO DAILY NEWS, Aug. 15, 2012, at A.10.

70 Ian Brownlie defines the state as having the following elements: a defined territory, a permanent population and an effective government. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 73-76 (3rd ed. 1979).


72 Cullen S. Hendrix defines state capacity as military capacity (the ability of the state to deter or repel challenges to its authority), bureaucratic administrative capacity (the ability of the state to collect and manage information) and quality and coherence of political institutions. Cullen S. Hendrix, Measuring State Capacity: Theoretical and Empirical Implications for the Study of Civil Conflict, 47 J. PEACE RES. 273 (2010).

73 On the anarchical state of international relations see HEDLEY BULL, THE ANARCHICAL SOCIETY: A STUDY OF ORDER IN WORLD POLITICS (4th ed. 2012). See also NEACK, supra note 71.
frequently measured according to the state’s to provide fundamental political goods: physical security, legitimate political institutions, economic management and social welfare. This translates to the ability to mobilize and extract resources within its territory—resources that in turn provide power and wealth that create security for the state and its people. An element relevant to measuring state strength is the level of corruption that pervades a country. Corruption not only affects development, but also highlights the limited nature of law enforcement and the judicial system; the rule of law is often subverted in societies affected by corruption. Corruption has a significant impact on women in societies in which traditional norms prevail and corruption is rampant because they face the double barrier of first having to overcome tradition before attaining scarce basic services. Conversely, corruption is lower in societies in which women have basic rights, including involvement in public institutions and economic empowerment. Simply, gender inequalities reduce “productivity in farms and enterprises and thus lower prospects for reducing poverty and ensuring economic progress. Gender inequalities also weaken a country’s governance—and thus the effectiveness of its development policies.”

74 This refers to Michael Mann’s concept of infrastructural power—the capacity of the state to penetrate civil society and implement its actions within the state. Michael Mann, Infrastructural Power Revisited, 43 STUD. IN COMP. INT’L DEV. 355 (2008). See also Hillel Soifer, State Infrastructural Power: Approaches to Conceptualization and Measurement, 43 STUD. IN COMP. INT’L DEV. 231 (2008) (noting some common errors that come with an infrastructural approach to studying state power). Stuart Eizenstat, John Porter and Jeremy Weinstein measure “weak,” “failing” and “failed” states using three criteria: security, the ability to provide basic services and the protection of civil rights. Stuart Eizenstat, John Edward Porter & Jeremy Weinstein, Rebuilding Weak States, 84 FOREIGN AFF. 134 (2005).

75 Stewart Patrick, Weak States and Global Threats: Fact or Fiction, 29 WASH. Q. 27, 29 (2006).


77 Kevin Sieff uses the case of Munir, a 37-year-old former police officer, who helps individuals obtain driving licenses in Afghanistan. By paying officials between $10 and $20, Munir is able to expedite the process of obtain driving licenses for his “clients,” a process which otherwise can take weeks. Munir makes around $10,000 per annum through this job, twice what he earned as a police officer. Kevin Sieff, To Cut Afghan Red Tape, Bribery is the Norm, WASH. POST (Feb. 17, 2013), http://www.washingtonpost.com/world/asia_pacific/to-cut-afghan-red-tape-bribing-is-the-norm/2013/02/17/93fc708e-6eff-11e2-8b8d-e0b59a1b8e2a_story.html.

78 Anne Marie Goetz, Political Cleaners: Women as the New Anti-Corruption Force?, 38 DEV. & CHANGE 87 (2007) (rejecting the myth of women’s incorruptibility by emphasizing that life and opportunities shape corruption, while also recognizing that men and women experience corruption differently).

79 See, e.g., Lena Wångerud, Variation in Corruption between Mexican States: Elaborating the gender perspective, APSA 2010 ANNUAL MEETING PAPER (2010) (noting that states within Mexico that have a higher portion of female elected officials display lower levels of corruption than states with a low number of women elected.)

overcome high rates of corruption and low development, often associated with weak or failed states, is to promote gender equality.

To understand the contested concept of weak states, it is useful to begin with the concept of a failed state, which has become a central feature in international politics. Domestically, a failed state refers to a state that is unable to meet its obligations vis-à-vis its inhabitants often because central authority had dissolved. Gerald Helman and Steven Ratner assert that a failed state is “utterly incapable of sustaining itself as a member of the international community.” In essence, failed states are not well-functioning states; they may not have legitimate government, and, even if they have a government, it has no monopoly over the use of force. It does not provide public goods or basic security and is unable to meet international obligations. Thus, “...state sovereignty has become more contingent upon the state’s ability to provide for the basic security of its citizens; when the state struggles to exist or fails to provide the security goods, it becomes fair game for international intervention.”

Contemporary Afghanistan is a weak state, which is a concern as there is always a danger that a weak state would become a failed state. This persistent danger gives rise to a desperate need to help Afghanistan address what makes it a weak state. As Sultan Barakat, Mark Evans and Steven A. Zyck argue, “[A]midst the pursuit of legitimacy in the short- to midterm, a post-conflict state must build the capacities and institutions to govern effectively in collaboration with those bedfellows from civil society, the international community and elsewhere with whom it must share governance and exercise authority.”

83 John Yoo, Fixing Failed States, 99 CALIF. L. REV. 95, 100 (2011).
85 This is developed from the following texts: Pauline H. Baker, supra note 80; Robert I. Rotberg, The Failure and Collapse of Nation-States: Breakdown, Prevention, and Repair, in WHEN STATES FAIL: CAUSES AND CONSEQUENCES 1 (Robert I. Rotberg ed., 2004).
89 Sultan Barakat, Mark Evans and Steven A. Zyck argue that it is important to invest in development projects because a lack of credible security can undermine the whole process of reconstruction in Afghanistan. Sultan Barakat, Mark Evans & Steven A. Zyck, Karzai’s Curse—Legitimacy as Stability in Afghanistan and Other Post-Conflict Environments, 33 POL’Y STUD. 439, 452 (2012).
II. FEMINISM, GENDER DISCRIMINATION & FEMINIST LEGAL THEORY

Throughout the twentieth-century, interest in promoting, protecting, and preserving women’s fundamental rights increased.\(^9\) The campaign to end gender discrimination received a major boost once governments adopted legislation, mechanisms and norms that not only granted women rights that they had been denied, but also enhanced their personal security and status in society.\(^9\) Notably, across the western world, governments introduced and implemented aggressive anti-discriminatory legislation and other measures aimed at dealing with equality and the ending of unfair practices.\(^9\) In non-western societies, changes with respect to the need to recognize women’s rights as human rights was and has been challenging because some of these societies have customary and cultural values that reject western concepts, especially those concerning women’s rights.\(^9\) This dichotomy is apparent in the discourse among liberal feminists,\(^9\) intersectional feminists,\(^9\) and anti-essentialist feminists.\(^9\) Radhika

\(^9\) An unprecedented level of discussion about women’s issues took place in the 1990s, especially with the Beijing Platform (1995) and Security Council Resolution 1325 (2000). See generally Rhonda Copelon, Bringing Beijing Home, 21 BROOK. J. INT’L L. 599 (1996) (highlighting the significant conceptual progress that has occurred with respect to women’s rights, particularly the international recognition at Beijing that “women’s rights are human rights”).


\(^9\) See UK legislation: Sex Discrimination Act (SDA) 1975 covering sex and married persons discrimination; Equal Pay Act (EPA) 1970 prohibiting unequal pay when women perform the same or comparable work to that performed by men. See also Civil Rights Act of 1964 (Title VII), which prohibits employment discrimination based on race, color, religion, sex, or national origin; Equal Pay Act of 1963 (EPA), which protects men and women who perform substantially equal work in the same establishment from sex-based wage discrimination. In addition to legislation, states have also created commissions, such as the Equal Employment Opportunity Commission (USA), to oversee racial or gender-based equality.


\(^9\) Susan Wendell describes the focus of liberal feminism as equality of opportunity. Liberal feminists promote the idea of equal legal rights for women and an end to state discrimination. Their commitment to education and the law places the state at the epicenter of liberal feminism. Susan Wendell, A Qualified Defense of Feminism, 2 HYPATIA 65, 66 (1987). See also Valerie Bryson, Men and Sex Equality: What Have They Got to Lose?, 20 POLITICS 3 (2000) (arguing that because genuine gender equality may result in short-term losses for men even though it will benefit them in the long-run men cannot be trusted to embrace gender equality and women must remain active).

Coomaraswamy, the former Special Rapporteur on Violence against Women captures this dichotomy in her analysis of identity:

For many women, their sense of identity arises as a result of their experience as women, living within groups primarily governed by men. Though their sense of self and dignity comes from how the wider society treats women, they often have to face discrimination within local groups. They may have to submit to discriminatory practices and laws, as well engage in rituals, customs, and habits that reinscribe the subordinate status of women within the hierarchy of their religious, ethnic, or tribal identity. Many women acquiesce because they see their group identity as the most important aspect of their lives. Others resist, only to be branded as traitors or “bad women” who bring the group into disrepute.97

Notably, as the process of addressing gender inequality developed, feminism and feminist legal theory became more diverse and challenging.98 Rosalind Dixon, for example, identifies six key strands within feminism: liberal, cultural, dominance, sex-positive, inter-sectional and post-structural/post-modern feminism. She notes that the strands are not mutually exclusive and share the same foundation—the need to recognize the inherent inequality that women endure in a male-dominant society. Nevertheless, they focus on different issues that range from society’s treatment of women to disparities between women and men.99 Liberal feminists, for example, concentrate on challenging jurisdictional boundaries within society that lead certain issues to be identified as private and others as public.100 Ultimately, liberal feminists call for equal entitlement and an
end to discriminatory practices through legislation. Cultural feminists, on the other hand, identify the source of gender injustice as the manner in which society characterizes masculine and feminine roles, which in turn leads to the devaluation of feminine roles and values. And, radical feminists assert that inequality stems from the subjugation of women by men, which occurs through sexuality—understood as a social process that generates, forms, conveys and directs desires that in turn help make the person. The key contribution of third-wave feminism, which emerged in the 1990s, is more tactical than philosophical—such feminists espouse a commitment to freedom, equality, justice and self-actualization. There are three main tactical differences between second and the third-wave feminists. First, third-wave feminists began to use personal narratives to illustrate an inter-sectional and multi-perspective vision of feminism. Second, third-wave feminists embraced a multi-vocal approach instead of synthesizing action and theoretical justification. Finally, third-wave feminists adopted an inclusive and nonjudgmental approach that eschews the notion of a grand narrative.


102 CAROL GILLIGAN, IN DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN’S DEVELOPMENT (1982).

103 Catherine A. MacKinnon, Feminism, Marxism, Method and the State: An Agenda for Theory, 7 SIGNS 515, 516 (1982) (noting, “As work is to Marxism, sexuality to feminism is socially constructed yet constructing, universal as activity yet historically specific, jointly comprised of matter and mind. As the organized expropriation of the work of some for the benefit of others defines a class—workers—the organized expropriation of the sexuality of some for the use of others defines the sex, woman. Heterosexuality is its structure, gender and family its congealed forms, sex roles its qualities generalized to social persona, reproduction a consequence, and control its issue.”)

104 See, generally, Rita Alfonso & Jo Trigilio, Surfing the Third Wave: A Dialogue between Two Third Wave Feminists, 12 HYPATIA 7 (1997); Amber E. Kinser, Negotiating Spaces For/Through Third-Wave Feminism, 16 NWSA JOURNAL 124 (2004); Deborah L. Siegel, The Legacy of the Personal: Generating Theory in Feminism’s Third Wave, 12 HYPATIA 46 (1997).

105 Stacy Gillis, Gillian Howie and Rebecca Munford write that first generation feminism was a response to the political, social, economic and public exclusion of women. Second generation feminists, on the other hand, sought greater social inclusion, concentrating on issues of motherhood, reproduction, sexual violence and sexual expression. Third generation feminists focus on their “otherness” from the previous generations. Stacy Gillis, Gillian Howie and Rebecca Munford, Introduction to THIRD WAVE FEMINISM: A CRITICAL EXPLORATION XXI-XXIV (Stacy Gillis & Gillian Howie with Rebecca Munford eds., 2d ed. 2007).

106 R. Claire Snyder, What is Third-Wave Feminism: A New Directions Essay, 34 SIGNS 175, 175-176, 192 (2008). See also Kinser, supra note 103.


108 Snyder, supra note 105.
It is within third-wave feminism that the clearest manifestation of Muslim feminism, which argues for a female presence within Islam, appeared. Two distinctive strands of Muslim feminism have emerged: secular feminism and Islamist feminism. The latter “draws on and is constituted by multiple discourses including secular nationalist, Islamic modernist, humanitarian/human rights, and democratic” discourses. Islamic feminism on the other hand, “is expressed in a single or paramount religiously grounded discourse taking the Qur'an as its central text.” The 1979 Iranian revolution accentuated this dichotomy, creating space for a new dialogue among Islam, feminism and women. Although the dialogue had been developing prior to the revolution, Iranian women envisioned the revolution as, “a catalyst for the emergence of a new reformist and feminist voices in Islam… [capable of] changing the terms of reference of Islamic discourse from within.”

Recognizing the historical debate within the Muslim community about the role of feminism in society highlights that Muslim women, both Islamists and liberals, have always demanded and continue to demand recognition not only of their rights, but also of their position in society as women, nationalists, mothers, wives...

---


110 Valentine M. Moghadam describes secular feminism as a rejection of religion because it is based in policies, laws and institutions and calls for critical analysis of religion. Valentine M. Moghadam, Feminism and Islamic Fundamentalism: A Secularist Interpretation, 13 J. WOMEN’S HIST. 42, 43 (2001).

111 See Shahrzad Mojab, Theorizing the Politics of “Islamic Feminism,” 69 FEMINIST REV. 124 (2001) (distinguishing between Muslim feminism and Islamic feminism, arguing that the latter seeks to retain women’s traditional role and not encourage the liberation of women from the grip of patriarchy). See also Valentine M. Moghadam, Islamic Feminism and Its Discontents: Toward a Resolution of the Debate, 27 SIGNS 1135 (2002) (recognizing the presence of Islamic feminism and secular feminism while arguing for synergy to move the debate forward).

112 Margot Badran, Between Secular and Islamic Feminism/s: Reflections on the Middle East and Beyond, 1 J. MIDDLE E. WOMEN’S STUD. 6, 6 (2005).

113 Badran, Between Secular and Islamic Feminism/s, supra note 111, at 6.

114 Margot Badran highlights the unique way in which feminism developed in the Middle East. She asserts that while the initial focus of western feminists was equal gender rights, while Middle Eastern women’s movements were involved in national liberation such that political rights became infused with personal (citizen) status rights. However, as the post-colonial Middle East state developed, religion slowly seeped into the discourse. Margot Badran, Unifying Women: Feminist Pasts and Presents in Yemen, 10 GENDER & HIST. 498 (1998).

115 Mir-Hosseini, supra note 40, at 631. See also, Nahid Yeganeh, Women, Nationalism and Islam in Contemporary Political Discourse in Iran, 44 FEMINIST REV. 3 (1993) (arguing that the Iranian Islamic revolution had promised women participation, but in reality undermined women’s position in the family and violated their individual and human rights).
and workers. Moreover, the debate surrounding feminism and Islam validates the conclusions of Irfan Ahmad’s study of Jamaat-e-Islami: “[I]t is not the Qur’an per se, which legitimates gender hierarchy, but the person making the interpretation thereof and the context in which it is done.”

A. International Law and Feminist Legal Theory: The Private-Public Divide

The process of recognizing and instituting a women’s international human rights regime began with the adoption of the Convention on the Declaration of Elimination of Discrimination against Women (CEDAW). The Convention, while focusing on ending discriminatory practices against women in the private and public spheres, has also had to contend with the gendered nature of international law and social and cultural norms that permit discriminatory practices and attitudes. A number of Muslim states took the position, for example, that the application of Article 2 challenges shari’a and, therefore,

116 Badran, supra note 100; Nawar Al-Hassan Golley, Is Feminism Relevant to Arab Women?, 25 THIRD WORLD Q. 521 (2004).
119 In its Preamble, CEDAW calls for “a change in the traditional role of men as well as the role of women in society and in the family.” CEDAW argues that changing traditional conceptions renders equality between men and women possible. In doing so, it recognizes that traditional norms, especially those related to the family and children, have allowed for discriminatory practices. UN General Assembly, Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18 1979, A/RES/34/180, available at http://www.refworld.org/docid/3b00f2244.html [hereinafter CEDAW]. See also the UN General Assembly Declaration on the Elimination of Violence against Women, which recognizes “that violence against women is a manifestation of historically unequal power relations between men and women, which have led to domination over and discrimination against women by men and to the prevention of the full advancement of women, and that violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men.” G.A. Res. 104, U.N. GAOR, 48th Sess., Supp. No. 49, U.N. Doc. A/48/49 (1993).
120 Numerous countries attached reservations to Article 2, which provides: State Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake: (a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle; (b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women; (c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination; (d) To refrain from engaging in any act or
their social, political and civil systems.\textsuperscript{121} Prima facie, the issue for a number of Muslim states with certain international legal norms can be attributed to the idea of a public-private sphere, which Muslim states consider a western concept alien to Islam.\textsuperscript{122} society because of its close association with modernity.\textsuperscript{123}

Much of the debate about women’s rights also appears in discussions of cultural rights and the rights of indigenous communities to sustain traditional norms, some of which counter the idea of equality. Article 5 of United Nations Declaration on the Rights of Indigenous Peoples, for example, declares: “Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State.”\textsuperscript{124} This stands in contrast to Article 3 of the International Convention of Civil and Political Rights, which holds: “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.”\textsuperscript{125} Significantly, the dichotomy often affects women more than it does men\textsuperscript{126} because men, due to their position in society, control, determine and practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation; (e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise; (f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women; (g) To repeal all national penal provisions which constitute discrimination against women. CEDAW, art. 2.

\textsuperscript{122} See infra Part III.B.
\textsuperscript{123} Nilufer Gole, Islam in Public: New Visibilities and New Imaginaries, 14 PUB. CULTURE 173 (2002) (noting that the growing visibility of Islam is leading to an eruption of religious-based discussions in which Muslims strive to address the challenges of modernity).
\textsuperscript{124} The Declaration’s Preamble also recognizes “that indigenous peoples have suffered from historic injustices as a result of, inter alia, their colonization and dispossession of their lands, territories and resources, thus preventing them from exercising, in particular, their right to development in accordance with their own needs and interests,” U.N.G.A., United Nations Declaration on the Rights of Indigenous Peoples, Oct. 2, 2007, A/RES/61/295, available at http://www.refworld.org/docid/471355a82.html.
\textsuperscript{126} This is most apparent with respect to marriage and the rights of indigenous women who marry outside of the community. Radhika Coomaraswamy points out that, in the case of Sandra Lovelace, the Human Rights Committee opted not to “delve into issues that would require the right to equality on the part of women to trump the right to culture” because “[f]or indigenous people, there exists a serious question of survival. Free marriage across boundaries may result in their assimilation and disappearance. Tribes have tried to control this possibility by limiting the marriage options of their women.” Coomaraswamy, supra note 97, at 500.
structure, norms. In doing so, they adopt measures that maintain the discriminatory practices.\textsuperscript{127}

Feminist engagement with international law peaked in the 1990s with international meetings, such as the Beijing Conference (1995), and changes in international criminal law that led to the recognition of sexual violence as an international crime.\textsuperscript{128} Pinnacle moments with respect to international law and women’s rights include the unanimous adoption of Security Council Resolution 1325\textsuperscript{129} and the Rome Statute, both of which incorporate sexual violence as an international crime.\textsuperscript{130} These measures heightened the need to espouse, promote and accept a gender regime. The adoption of Security Council resolutions 1325,\textsuperscript{131} 1820,\textsuperscript{132} and 1889\textsuperscript{133} introduced a new language that recognized women as “subjects of international law, enjoying autonomy and rights,” as opposed to vulnerable victims.\textsuperscript{134} Security Council Resolution 1325 also fostered institutional change by demanding the integration of a gender perspective in UN peace and security work.\textsuperscript{135} And, by mandating consciousness of gender issues, the resolutions empowered local women’s groups.\textsuperscript{136}

\textsuperscript{127} Nadine Puechguirbal, for example, demonstrates how male power is sustained by consistently defining women as vulnerable individuals. Nadine Puechguirbal, \textit{Discourses on Gender, Patriarchy and Resolution 1325: A Textual Analysis of UN Documents}, 17 INT’L PEACEKEEPING 172 (2010). Eleanor A. Doumato describes how the Saudi government reacted to a women's driving demonstration in November 1990. The Interior Ministry, led by Prince Naif, supported the \textit{mutawwi’in} (religious police). The government, first issued a ban on all political activity by women, followed by a \textit{fatwa} by Shaykh ‘Abd Allah ibn ‘Abd al-'Aziz ibn Baz from the government-sponsored Directorate of Islamic Research, Ruling, Propaganda and Guidance claiming that shari’a prohibits women from driving. The government also confiscated the passports of the husbands of the women who had demonstrated and others were suspended from government employment. Eleanor A. Doumato, \textit{Gender, Monarchy, and National Identity in Saudi Arabia}, 19 BRITISH J. MIDDLE E. STUD. 31-32 (1992).


\textsuperscript{130} Significantly, the Rome Statute does not recognize rape and sexual violence as standalone crimes, but as a subset of genocide (Article 6(d)—“Imposing measures intended to prevent births within the group;”); a crime against humanity (Article 7(g)—“Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;”); or a war crime (Article 8(b)(xxii)—“Committing rape, sexual slavery, enforced prostitution, forced pregnancy”). \textit{Rome Statute of the International Criminal Court}, UN Doc A/CONF.183/9, 2187 UNTS 90 (1998).


The claim that Islam must permeate every aspect of the state makes application of the public-private divide exceedingly difficult in many Islamic states. This view rises from a distinctive Islamist jurisprudence that maintains that religion lies at the epicenter of everything. And yet, because Islamic states have been willing to adopt international human rights agreements, including conventions demanding gender equality, others claim that the rights accorded under these treaties are only for the public sphere and not the private. Opposition towards a quintessential gender-neutral interpretation of international human rights law and a commitment to maintaining the separation between private and public spaces incentivizes conservatives to locate issues within the private sphere into which such rights arguably do not extend. The essence of this approach lies in the early anti-colonial movement during which husbands and fathers assumed western attire and education, but conservative groups continued to demand that women maintain traditions. “The private was seen as the space for women who would keep the family insulated from the pressures of the public colonial world. Women then became the custodians of the culture of ethnic, religious, and tribal groups.”

In contemporary society, many Islamic states, including Afghanistan, maintain a division between the public and private. Islamic States sometimes enact laws

137 See infra Part III.B.
139 Donna Arzt, for example, notes the opposition of the Saudi delegate to Article 18 of the International Convention on Civil and Political Rights. The Saudi delegate argued that the prohibition against coercion regarding the practice of one’s chosen religion raised doubt among those for whom religion is a way of life. Addressing the conventions on women, Arzt points out that the Saudi delegates to the UN in 1948 also opposed provisions on women’s rights, arguing that Islamic law addresses these rights and that marriage should not be burdened by international requirements that call for wives to be of full age and enjoy equal rights. Donna E. Arzt, The Application of International Human Rights Law in Islamic States, 12 Hum. RTS. Q. 202, 217-19 (1990). See also Theresa Perkins, Unveiling Muslim Women: The Constitutionality of Hijab Restrictions in Turkey, Tunisia and Kosovo, 30 B.U. INT’L L.J. 529 (2012) (pointing out how Kosovo, Tunisia and Turkey have adhered to and at times manipulated international human rights law in relation to religious veiling).
140 See Badran, supra note 98, at 6.
141 Coomaraswamy, supra note 97, at 487. Adrien Wing writes: “[C]ustom and customary law in the Palestinian community are based upon patriarchy that has resulted in women’s continued social and legal subordination. Men govern the public and private lives of women, often limiting them to their historical roles as nurturers and repositories of family honor.” Adrien Katherine Wing, Custom, Religion, and Rights: The Future Legal Status of Palestinian Women, 35 Harv. Int’l L.J. 149, 157 (1994).
142 An Islamic State is understood as a state that places Islam at its epicenter. Pakistan is a fitting example of an Islamic state. It began as an Islamic Republic (or a Muslim State) and later turned into an Islamic State in 1973. Ziring distinguishes the two, asserting that an Islamic Republic separates religion from politics and government as it stresses the need for a secular, constitutional government and society, while an Islamic State governs along Islamic precepts, rejecting the values that the Islamic Republic espouses. Lawrence Ziring, From Islamic Republic to Islamic State in Pakistan, 24 Asian Surv. 931 (1984).
viewed as secular or western, albeit with reservations. However, measures that address issues relating to the private sphere—marriage, inheritance, divorce, custody, etcetera—are characterized not only by a demand but also a commitment to keep the state out. As Professor Asifa Quraishi, a scholar and activist in the field of Islamic Law and women notes: When the international community challenges shari’a-based legislation “such opposition often triggers an almost knee-jerk reaction among many Muslims to fiercely defend these laws as if they were defending their religion itself against a crusade-like attack.” Quraishi thus argues that the reaction is frequently more about refusing to abide by the international community than it is about following Islamic law. According to some scholars and practitioners, this creates a need to work with Islamic jurist and shari’a courts.

III. ISLAM, WOMEN’S RIGHTS AND ISLAMISM

This section highlights that Islam is not inimical to women and women’s rights. Rather, the combination of tribal and patriarchal norms supported by a contrived interpretation of Islamic law and empowered by the rise of Islamism—political Islam—fuels the prevalence of misogyny in Islamic States. Conservatives, who view empowerment policies as a challenge to Islamic, tribal and cultural norms, have instead advocated the adoption of policies that prevent the empowerment of women in the private space. Critical to the analysis is a

---

143 This was made abundantly clear under Taliban rule; women had to wear the veil in public even though the veil is arguably a religious symbol. Perkins writes that women wear the veil for a number of reasons, including community identification, tradition, and as a personal choice. Perkins, supra note 138, at 533-36 (2012); Anastasia Telesetsky, In the Shadows and Behind the Veil: Women in Afghanistan under the Taliban Rule, 13 BERKELEY J. INT’L L. 293 (1998).

144 Bharathi Anandhi Venkatraman, supra note 32 (defending the reservation that a number of Muslim states attached to CEDAW because the convention encapsulates inherent cultural bias with respect to Muslim-majority states).

145 ALL, supra note 26, at 93-94.


147 Ayesha Imam, a member of the international solidarity network Women Living Under Muslim Laws (WLUM) and founding director of BAOBAB For Women’s Human Rights, argues that the way to advance women’s rights and protection is through Muslim Law. She further notes that the involvement of the international community and of international human rights may be detrimental to the cause. Ayesha Imam, Working within Nigeria’s Sharia Courts (Interview with Ayesha Imam), 2 HUM. RTS. DIALOGUE 22 (2003).

148 See infra Part III.B

149 See, e.g., Mir-Hosseini, supra note 40 (noting that the Iranian Islamic revolution betrayed women by subverting their rights and denying them justice); Sayeh & Morse, Jr., supra note 32 (challenging the assumption that Islam is the cause of the limited development of women’s rights in Muslim societies); Kathryn J. Webber, The Economic Future of Afghan Women: The Interaction between Islamic Law and Muslim Culture, 18 U. PA. J. INT’L ECON. L. 1049 (1997) (highlighting that Islam itself is not anti-woman; rather, the Taliban’s interpretation of Islam, which is infused with misogynistic social norms and customs, limits Afghan’s women’s economic opportunities).

150 Bharathi Anandhi Venkatraman, for example, argues that the Report of the Committee on the Elimination of Discrimination against Women, which criticizes arranged
recognition that the Islamist assertion that the “gate of *ijtihad*” (reasoning) was closed in the ninth century allows opponents of women’s rights to claim that new interpretations of Islamic law are not permissible.\(^{151}\) Although Muslim societies are by definition inherently conservative,\(^{152}\) a heightened sense of conservatism surrounds the family and issues of honor, accentuating the public-private divide and allowing many to embrace the Islamist interpretation.\(^{153}\)

Islam is not only a religion; it is an all-encompassing way of life.\(^{154}\) This makes it difficult to question certain principles,\(^{155}\) unless the Qur’an and/or the *Sunnah* (general behavior of the Prophet) offer a clear explanation.\(^{156}\) The jurisdictional methodology of Islamic law, which begins with the divine and moves to the earthly, reflects this comprehensive view of Islam and the corresponding demands of its disciplines. At the top of Islamic law is the Qur’an, which is comprised of the verbatim words of Allah (God) as revealed to the Prophet Mohammed over a period of twenty-three years and regarded as the most authoritative guide to how Muslims should conduct themselves.\(^{157}\)

The centrality of the Qur’an stems from the fact that ‘*huda* (guiding light) provides its reader with knowledge to help the reader live a righteous existence.\(^{158}\) The Qur’an’s centrality within the Muslim community can be attributed to this provision of knowledge—both divine and earthly.\(^{159}\) The thread that links Muslims together, the Qur’an “is aimed at establishing basic standards for Muslim societies and guiding these communities in terms of their rights and marriages, common in Islamic State, highlights a cultural bias. Venkatraman, *supra* note 32, at 2000-2002.\(^{151}\) Hallaq, *supra* note 34 (rejecting the notion that the gates of Ijihad were closed and arguing that Islamic legal theory has continued to apply reasoning in interpreting Islamic law).\(^{152}\) See, e.g., Gellner, *supra* note 57.


The challenge however is that within the Qur’an’s 114 surahs (chapters) and 6235 ayat (verses), only approximately 600 ayat are legal rules. The limited number of legal rules has necessitated the development of secondary Islamic sources: the Sunnah, which contains the narratives and practices approved by the Prophet Mohammed in a series of hadiths (reports); ijma (consensus of opinion), which is based on rational proof and reasoning that come from divine revelation; the qiyas, which use analogical reasoning to extend the application of sharia to new situations and ideas; and urf (custom), the collective practice of a group of people, which complements rules that the Qur’an does not fully explain. Consequently, a practicing Muslim has to combine the divine with the earthly. While duties (farud) are discernible within the Qur’an, rights (huqiq) are less visible. Islam’s strong emphasis on communitarian values adds further complexity. Famed jurist Sayyid Jamal al-Din al-Afghani, for example, warned against tribalism because it rejects the uniform application of Islam. The additional element of reasoning is controversial because the nature of the Qur’an and its limited number of legal rules make it difficult at times to reach a collective agreement (ijihad jama’i). Few statements within the Qur’an are unambiguous, such that legal pluralism—which highlights the flexibility and adaptability of Islamic law when the application of reasoning

---


161 Helena Malikyar claims that there are only 80 legal verses. Helena Malikyar, Development of Family Law in Afghanistan: The Roles of the Hanafi Madhhab, Customary Practices and Power Politics, 16 CENT. ASIAN SURV. 389 (1997). Gamal Moursi Badr writes that “[t]he Qur’an is far from being a legal code. In fact it contains very few legal provisions. Out of a total of 6237 verses only 190 verses or 3% of the total can be said to contain legal provisions.” Gamal Moursi Badr, Islamic Law: Its Relation to Other Legal Systems, 26 AM. J. COMP. L. 187, 188 (1977-1978).

162 Modern Muslim society continues to rely on urf. See Wing, supra note 124, at 152-53.

163 The Qur’an, for example, requires that a husband provide for his wife, without stating how much. Christie S. Warren, Lifting the Veil: Women and Islamic Law 15 CARDOZo L.J. & GENDER 33, 36-37 (2008-2009). Helena Malikyar notes that “[w]hen the great jurists such as Abu Hanifa and Malik ibn Anas attempted to fill the gaps in Islamic fiqh (jurisprudence), they incorporated a great deal of customary practices and traditionally established norms of their environment. The Hanafi rulings on marriage and divorce, for example, clearly reflect their founder’s strictly patriarchal heritage.” Malikyar, supra note 161, at 390.

164 Arzt, supra note 139, at 206-07.

165 Slaughter notes: “Islamic society thus is defined by a system of duties and obligations that God commands man to follow. This will create a just society; in Islam this means one that conforms to the will of God. Islam is therefore an intensely legal religion where the law expresses the nomos and essence of the community. This community, or ummah, replaces other boundaries of corporate identity such as family, tribe, and nation. The ummah is open to all who recognize Allah and his Prophet Mohammed. Neither membership nor allegiance is determined by race, caste, or class.” Slaughter, supra note 154, at 173.

150 SAYYID JAMAL AL-DIN, Islamic Solidarity, in ISLAM IN TRANSITION: MUSLIM PERSPECTIVES 17 (John Donohue & John L. Esposito eds. 2007).
necessitates developments—plays an important role in its interpretation. Jurists al-Adhimi and al-Baydawi, however, takes the position that only Muslim adults who are well-versed in all aspects of Islamic law can engage in *ijtihad*.

These three elements are also affected by Muslim society’s adherence to a system of social hierarchy in which free, adult Muslim men enjoy the most civil and political rights. Free mature Muslim women occupy the second tier, followed by slave non-Muslim female minors. The rights of women draw on the first four sources: the Qur’an, hadiths, *ijma*, and *qiyas*. Male dominance, however, ensures that *urf* reasoning, disguised as true source of Islamic law, takes precedence, therefore limiting the body of women’s rights.

### A. Family Law and Women

When it comes to Muslim women, the gender debate occurs in two increasingly interconnected spheres: (1) the religious sphere that relies on the Qur’an and specifically Islamic law; and (2) the cultural-socio-economic sphere that posits arguments designed to either defend or reject the current status of Muslim women. Thus, those opposing the empowerment of women may argue that empowerment would undermine social values, specifically the family. An integral element in the debate is the rewriting or reinterpretation of history and religion. The role of culture and religion is well-established, but it becomes...

---

164 HALLAQ, supra note 156, at 26-28.


166 Shaheen Sardar Ali asserts that of 6666 versus in the Qur’an and at the most only six versus reinforce the social hierarchy claim. SHAHEEN SARDAR ALI, supra note 28 at 43.

167 Khaliq, supra note 121, at 13-14.

168 SHAHEEN SARDAR ALI, supra note 28.

169 Writing about Palestinian women, Professor Wing states: “As a result of customary norms, women are governed by a system of patriarchy in which their roles are limited to nurturers and repositories of family honor.” Wing, supra note 140, at 152. See also John Hursh, *Advancing Women’s Rights Through Islamic Law: The Example of Morocco*, 27 BERKELEY J. GENDER & JUST., 252 (2012) (reviewing women’s rights in Morocco following the 2004 changes to Morocco’s Code of Personal Status); Alexandra J. Zolan, *The Effect of Islamization on the Legal and Social Status of Women in Iran*, 7 B. C. WORLD L.J. 183 (1987) (noting how the status of women changed after the Iranian revolution due to the implementation of traditional Islamic precepts related to women, their position and duties vis-à-vis the family).


171 BEVERLEY MILTON-EDWARDS, CONTEMPORARY POLITICS IN THE MIDDLE EAST, 173-194 (2000). See also Webber, supra note 148 (noting that Islamic law grants women specific economic rights, while recognizing that social and cultural norms limit women’s economic power).


173 A good example of this is the debate over polygamy. Before the Battle of Uhud, polygamy was associated with *jahiliyya*—pre-Islamic times. After the battle, however,
most visible with respect to sexuality and family law, specifically divorce and children and women’s obedience to their husband or male relatives. Iranian feminist Ziba Mir-Hosseini captured this development, arguing that the most developed area of \textit{fiqh} (science of jurisprudence) is Islamic family law. This is ironic because family law is also the area in which “[t]he boundary between sacred and temporal has been most blurred.” Thus, jurisprudence is central to women’s rights and the position of women in Islam; it is through \textit{fiqh} that Muslim jurists interpret the \textit{shari’a}, which is then applied to society as a whole. Notably, when delving into the discourse, there exists a need to distinguish between the religion that is Islam and those that interpret it. As

---


Arguably, only men have the right to seek a divorce. Karin Carmit Yefet, \textit{Constitution and Female-Initiated Divorce in Pakistan: Western Liberalism in Islamic Garb}, 34 HARV. J. L. \& GENDER 553, 557 (2011).

Conservative Muslims refer to Sura 4, Verse 34 in the Qur’an to justify men’s dominance within the family. The verse states: “(Husbands) are the protectors And maintainers of their (wives) Because Allah has given The one more (strength) Than the other, and because They support them From their means. Therefore the righteous women Are devoutly obedient, and guard In (the husband’s) absence What Allah would have them guard. As to those women On whose part ye fear Disloyalty and ill-conduct, Admonish them (first), (Next) refuse to share their beds, (And last) spank them (lightly); But if they return to obedience, Seek not against them means (of annoyance): For Allah is Most High Great (above you all).” ERNEST ABDULLAH YUSUF ALLI, \textit{THE MEANING OF THE HOLY QUR’AN} 195-96 (1997). \textit{See also} Hajjar, \textit{ supra} note 33 (looking at the relationship among domestic violence, impunity and the state, and how religion is used to block legislation that would prevent domestic violence).

Mir-Hosseini, \textit{ supra} note 40, at 634. See, \textit{ e.g.,} Asma T. Uddin, \textit{Religious Freedom Implication of Sharia Implementation in Aceh, Indonesia}, 7 U. ST. THOMAS L.J. 603 (2009-2010) (analyzing regulations and their impact on society in Aceh). Shannon Dunn and Rosemary Kellison note a German case in which a woman of Moroccan descent petitioned a German court for a speedy divorce on the grounds that her husband was physically abusive towards her and had threatened to kill her. Even though the police had come to the couple’s home, Judge Christa Datz-Winter refused the petition, arguing that wife beating was common in Moroccan culture and the Qur’an permits such violence. Shannon Dunn \& Rosemary B. Kellison, \textit{At the Intersection of Scripture and Law: Qur’an 4:34 and Violence against Women}, 26 J. FEMINIST STUD. \& RELIGION 11, 11-12 (2010).

Ziba Mir-Hosseini argues that the loss of stature and rights of women in Iran can be attributed to the rising importance that clerics placed on \textit{fiqh}, especially in the realm of family law. She claims: “The Islamic judges in whose courts I sat in the 1980s often told me that I had chosen the wrong place to learn about the sharia. I should to go to the
Amina Wadud notes: “[A]fter the death of the Prophet, Islam, as it has been practiced, has been less than just to women.” She adds:

[S]ocial groups have not always lived up to complete gender justice. The absence of justice and equality for women in Muslim society was not the intention of Islam as established in the Qur’anic worldview, nor was it an intention of Muslim societies to dishonor women. However, when such injustice has been made apparent, we must alleviate its impact and correct its harm, rather than defend it on the grounds that it was unintentional.181

Eminent Sudanese-born Islamic scholar Abdullahi An-Na’im argues that Islam guaranteed Muslim women an independent legal personality that includes a right to hold property, have their own inheritance, enjoy education—as long as it is separated from that of men—and participate in public life.182 An-Na’im adds that when it comes to family law, Islam not only restricted polygamy, but also guaranteed a wife’s right to maintenance and right treatment.183 This view is based on the claim that Islam does not distinguish between men and women when it comes to their relationship with Allah.184 These scholars thus maintain that a distinction exists between Islamic law and its interpretation.185

Islamists adhere to a distinctive view of women, their rights and, therefore, their position in society that stems from their reading of the Qur’an and Islamic Law.186 They promote an argument structured around the Qur’an and especially fiqh to justify their discriminatory agenda.187 The clearest manifestation of the Islamist agenda vis-à-vis women is its defense of polygamy188 based on Surah

183 An-Na’im, Islamic Law, International Relations, and Human Rights, supra note 140, at 495.
184 Urfan Khaliq, supra note 121, at 12-13; SAIA KAUSAR, SJAAD HUSSAIN & MOHAMMAD MAZHER IDRIS, Does the Qur’an Condone Domestic Violence?, in HONOUR, VIOLENCE, WOMEN AND ISLAM 96 (Mohammad Mazher Idriss & Thair Abbas eds, 2010).
185 See ANNE ELIZABETH MAYER, ISLAM AND HUMAN RIGHTS (2nd ed. 1995); Webber, supra note 148.
187 See Sayeh & Morse, Jr., supra note 32.
Using Feminist Legal Theory in Explaining the Lack of Progress of Women’s Rights in Afghanistan: The Need for a State Strength Approach

Do not cite or copy. All rights reserved.

4:3, which reads: “Marry women of your choice, Two, or three, or four”. The Islamists also apply other surahs, such as surah 24:31 to support the segregation of women and as a defense for the veil. Polygamy, segregation of the sexes and the veil are common in traditional, rural Muslim societies that sustain their cultural and tribal heritage. As a result, the link between culture and religion is at times blurred in traditional Muslim society.

1. Family, Tribal Practices and Patriarchy
The masculine interpretation of Islam becomes most visible in societies with a strong tribal identity—Saudi Arabia, Yemen, Iraq, Sudan, Pakistan and Afghanistan. In these tribal societies, the role and the significance of the family increase. Economic progress and social movement occur through the family, which also imposes enormous restrictions on women who sustain the

189 The problem with this Surah is that when it is read in its fullest, a different image emerges. “If ye fear that ye shall not Be able to deal justly With the orphans, Marry women of your choice, Two, or three, or four; But if ye fear that ye shall not Be able to deal justly (with them), Then only one, or (a captive) That your right hand possess. That will be more suitable, To prevent you From doing injustice.” ABDULLAH YUSUF ALI, THE MEANING OF THE HOLY QUR’AN 184 (1997). When the Prophet Mohammed’s wife Khadija died, this Surah arguably permitted his marriage to a number of women as a way to strengthen Islam and gain protection from enemies that wanted to harm him and Islam. Leila Ahmed, Women and the Advent of Islam, 11 SIGNS 665 (1985) (recognizing the difficulty of discerning to the impact of Islam on women).

190 See, e.g., Valorie K. Vojdik, Politics of the Headscarf in Turkey: Masculinities, Feminism, and the Construction of Collective Identities, 33 HARV. J.L & GENDER 661 (2010) (arguing that the debate over the veil in Turkey is as much about power as it is about religion, secularism and the relationship between the West and Islam). See generally Mayer, supra note 20 (arguing that Islamism represents an interpretation of Islamic law and that the construction of Islamic precepts vis-à-vis women in Saudi Arabia and Iran stems from that distinctive interpretation).

191 See, e.g., Sarah Charmichael, Marriage and Power: Age at First Marriage and Spousal Age Gap in Lesser Developed Countries, 16 THE HISTORY OF THE FAMILY 416 (2011) (finding that education and urbanization have an impact on the age at which one marries).

192 al-Hibri, supra note 172, at 5 (“The cultural component gave rise to certain fundamental social and political assumptions. These assumptions have become so deeply rooted in Islamic jurisprudence that many Muslims are no longer aware of their non-religious origins. The assumptions gave rise to a then common model of state and family relationships which are best described today as authoritarian/patriarchal.”).

193 The influence of tribal culture on women is evident in Afghanistan in which familial or kinship ties have extended into political and religious worlds. Dupree, supra note 26 (explaining that Afghans remain committed to their identity, which is based on tradition, location and culture, in spite of attempts to promote a national identity). See also Vojdik, supra note 176 (using masculinities theory to examine the veil and its relationship to gender, political power and the state).

194 In Pakistan, for example, the biraderi (brotherhood) of participation links families together. Hamza A. Alavi, Kingship in West Punjab Villages, 6 CONTRIBUTIONS TO INDIAN SOCIOLOGY, 1 (1972). Daniyal Mueenuddin, a Punjabi mango farmer describes biraderi: “In Pakistan, your primary loyalty is to your biraderi, an untranslatable word, something like clan, but more visceral and entailing greater responsibility and connection. You marry among your biraderi, you must travel and be present when a member of your biraderi is married or buried and, in times of trouble, you stand by your biraderi.”
tribe through procreation, thereby compelling men to control them. Albert Hourani views the “tribe” as a natural phenomenon of rural society in which people come together because cooperation is central for survival. Russel Lawrence Barsh asserts that the term tribal in contemporary social science denotes a group of related people that share a kinship that sets them apart from others. “In a tribe, kinship is the principal institution; social, economic, cultural, religious and political activity is organized around kinship groupings, such as lineages and clans. Kinship relationships govern most individual rights and responsibilities.”

In societies in which insecurity is pervasive and the state is either non-existent or perpetually weak, individuals believe that they can only rely on themselves for security. This explains the development of tribe and its continued existence. Fawaz Gerges writes that a tribalist society, “…is disproportionately more religious than other social configurations. Among members of the tribe, the good of the individual is subservient to the collective good. Tribal loyalties can function as a powerful motivator when they overlap with religious and ideological affinities.” Accordingly, the family is sacrosanct in tribal societies because it not only holds the tribe together, but also enables the tribe to withstand threats through filial linkages—all have stand to stand together against any threat or insult. Religious values only serve to place more demands on the family, which becomes central not only to the survival not only of the tribe but to the umma

Daniyal Mueenuddin, A Lifetime, Washed Away, N.Y. TIMES, Aug. 19, 2010, at A27. In the Arab World, the concept of wasta—mediation or intercession—allows one to intercede to provide a benefit to a client or family member. Robert B. Cunningham & Yasin K. Sarayrah, Taming Wasta to Achieve Development, 16 ARAB STUD. Q. 29 (1994); Jihad Makhoul & Lindsey Harrison, Intercessory Wasta and Village Development in Lebanon, 26 ARAB STUD. Q. 25 (2004).

195 Sherifa Zuhur, Of Milk-Mothers and Sacred Bonds: Islam, Patriarchy, and New Reproductive Technologies, 25 CREIGHTON L. REV. 1725, 1726 (1991-1992) (highlighting the importance of children, specifically sons: “Failure to bear sons often resulted in divorce and a return to a woman’s parental home, or in her husband’s marriage to another wife through the institution of polygamy. The pain of childlessness held devastating economic and social meaning for Muslim women.”).


198 Gerges, supra note 18, at 108.

199 A contemporary example of this is the notion of “honor killing” a practice that involves the participation of families, immediate or extended, pain killing a person deemed to have brought shame and dishonor to the family and the tribe. See, e.g., Mazna Hussain, Take My Riches, Give Me Justice: A Contextual Analysis of Pakistan’s Honor Crimes Legislation, 29 HARV. J.L & GENDER 223, 223-24 (2006) (noting that Mukhtar Mai was raped on the alleged order of Mastoi tribal council to punish Mai’s brother who was accused of having sexual relations with a woman from the Masori tribe): Rachel A. Ruane, Murder in the Name of Honor: Violence against Women in Jordan and Pakistan, 14 EMORY INT’L L. REV. 1523 (2000).
Islamists who espouse this rationale are therefore able to argue that the primary role of women is to raise children and look after the family, which in turn strengthens the community. Donna Lee Brown writes:

For conservative religious groups (including Muslim activists), women’s behavior has become a shorthand for the health of a society. Moreover, women’s roles have become a mark of piety and religiosity. Men’s religiosity is judged by the demeanor of their women and the women’s conformity to ideal norms of behavior. The well-being of the community hinges upon visible patterns of female conduct.

The final ingredient within tribal societies, the importance of which is heightened by customary practices, is honor. Honor plays a central role in the maintenance, preservation and expansion of discriminatory practices. Studies suggest, in fact, that the issue of honor is not associated with religion as much as it is linked to cultural and tribal norms. The issue of honor became central to the formation of the Arab state; the state is considered a feminine entity and defense obligations fall on men. When the state is dishonored by a failure to adhere to

---

200 AYUBI, supra note 18, at 35-38; Baron, supra note 21.
201 C. Christine Fair’s study of madrasas in Pakistan emphasizes the role that women (mothers) play in fostering Islamic observance. At its most extreme, it encourages suicide terrorism. C. Christine Fair, Who Are Pakistan’s Militants and Their Families? 20 TERRORISM & POLITICAL VIOLENCE 49 (2008); C. Christine Fair, The Educated Militants of Pakistan: Implications for Pakistan’s Domestic Security, 16 CONT. S. ASIA 93 (2008); C. Christine Fair, Militant Recruitment in Pakistan: Implications for Al Qaeda and Other Organizations, 27 STUD. CONFLICT & TERRORISM 489 (2004).
202 GEGES, supra note 18, at 52-54.
203 DONNA LEE BOWEN, Islamic Law and the Position of Women, in ISLAM AND SOCIAL POLICY 44 (Stephen P. Heyneman, ed. 2004).
204 KNUDSEN, VIOLENCE AND BELONGING: LAND, LOVE AND LETHAL CONFLICT IN THE NORTH-WEST FRONTIER PROVINCE OF PAKISTAN (2009) (presenting an ethnographic study of the people of NWFP that highlights the impact of honor on society and its role in perpetuating often decade-long feuds). A study of 865 ninth-grade students in Jordan revealed that about approximately 40 percent of boys and around 20 percent of girls subscribe to the view that the killing of a daughter, sister or wife who has shamed or dishonored the family is justifiable. Manuel Eisner & Lana Ghuneim, Honor Killing Attitudes amongst Adolescents in Amman, Jordan, 39 AGGRESSIVE BEHAVIOR 405 (2013). Masood Ali Shaikh, Irshad Ali Shaikh, Anila Kamal & Sobia Masood, Attitudes About Honour Killing Among Men and Women ― Perspective From Islamabad, 22 J. AYUB MED. C. ABBOTABAT 38 (2010) (finding that of the 600 individuals that participated in the study, 343 or 57.1 percent found it acceptable and justifiable to kill one’s wife as a mean to save one’s honor).
205 Eisner and Ghuneim conclude: “[S]upport for honor killings is more widespread amongst adolescents from poorer and more traditional family backgrounds.” Moreover, they assert that traditionalism, a belief in female chastity and a tendency to morally neutralize aggressive behaviors inform attitudes towards honor killings. Eisner & Ghuneim, supra note 190, at 413.
206 See, e.g. Christina A. Madek, Killing Dishonor: Effective Eradication of Honor Killing, 29 SUFFOLK TRANSNAT’L L. REV. 53 (2005-2006) (arguing that honor killings have become more entrenched and prominent in Islamic culture even though the Qur’an
strict Islamic or customary norms, men are also dishonored because they are unable to protect the state. As Beth Baron explains, “Honour in the Arab world is thus a collective…. [It] helped define the parameters of the collective. The entire family’s honour—and here family meant those related by blood through the male line—resides in the conduct of its women.”

In contemporary Muslim society, “honor killings” exemplify the centrality of honor to the family and a woman’s position in society. Ideas about the proper conduct of women mold the concept of honor while the duty of restoring honor falls on men. A belief in male ownership of women gives rise to the notion that one can and should kill or harm a female family member if she behaves immorally or immodestly. The high incidence of honor killings suggests that men have responded to female immodesty in an increasingly extreme manner—with the spilling of blood.

B. Islamism: Its Role and Impact on Women’s Rights

Islam, like all major religions, has had to contend with many strands that espouse interpretations and agendas manifestly different from those of the mainstream. Since 9/11, conservative interpretations of Islam have become more frequently associated with fundamentalists, radicals and, in extreme cases, jihadists. The interconnectedness of politics, Islam and Islamic religious revivalism has facilitated the rise of Islamism. Often viewed as a political movement,
Islamism appears in different shades and variations. Graham Fuller, former Vice-Chairman of the National Intelligence Council at the Central Intelligence Agency explained:

Today one encounters Islamists who may be either radical or moderate, political or apolitical, violent or quietist, traditional or modernist, democratic or authoritarian. The oppressive Taliban of Afghanistan and the murderous Algerian Armed Islamic Group (known by its French acronym, GIA) lie at one fanatic point of a compass that also includes Pakistan's peaceful and apolitical preaching-to-the-people movement, the Tablighi Jamaat; Egypt's mainstream conservative parliamentary party, the Muslim Brotherhood; and Turkey's democratic and modernist Fazilet/AKP Party.214

The rise of Islamism is complex. Islamists typically want not only to ensure that Muslims practice Islam in the same manner as the Prophet Mohammed and his immediate followers, but also to place Islam at the center of society.215 This necessitates involvement in the political process as a key way to change policy or introduce new measures through the political process.216 Islamism views secularism, understood through Pan-Arabism, as a failure and source of

214 Fuller, supra note 212, at 49. Mohammed Ayoob writes: “In practice, no two Islamisms are alike because they are determined by the contexts within which they operate. What works in Egypt will not work in Indonesia. What works in Saudi Arabia will not work in Turkey. Anyone familiar with the diversity of the Muslim world—its socioeconomic characteristics, cultures, political systems, and trajectories of intellectual development—is bound to realize that the political manifestations of Islam, like the practice of Islam itself, are to a great extent context specific, the result of the interpenetration of religious precepts and local culture, including political culture.” Mohammed Ayoob, Political Islam: Image and Reality, 21 WORLD POL’Y J. 1-2 (2004).
215 Professor Maha Azzam notes: “The roots of contemporary radicalism lie more in the secular tradition and experience than in the realms of religion and its legacy, which now offer so many new trajectories in regard to legitimate political action and the resort to violence…. There is a shared anger and sense of humiliation across different ideological and political groups in the Muslim world. Islamism has harnessed these feelings and provided more effective networks and a more expressive language of resistance than other ideological currents at this historical juncture. Islamist groups continue to gain ground, partly because of an increase in religiosity and faith in Muslim societies and partly because of politics. With the growing Islamization of Muslim societies culturally, the ground is being prepared for a greater acceptance among many for an Islamization of the state as well.” Azzam, supra note 198, at 1121.
216 Stacey Philbrick Yadav writes: “…Islamists can be understood as actors who seek to transform the terms of public debate, whether institutionally or discursively. In the institutional realm, this means changing the formal rules that order the relationship between state and society, while discursive change is reflected in the informal rules and norms that give shape to this relationship.” Stacey Philbrick Yadav, Understanding “What Islamists Want”: Public Debate and Contestation in Lebanon and Yemen, 64 MIDDLE E.J. 199, 200 (2010).
humiliation. The failure of non-religious, nationalist and anti-colonialist Muslim movements that Gamel Nasser and other secular Muslim leaders espoused in the 1950s and 1960s through the Pan-Arabism movement encouraged Muslims in the Arab World to seek a new approach to explain the shortcomings of their societies. More specifically, the path towards Islamism began in 1967, following the Six Day War between Israel and its Arab neighbors—Egypt, Syria and Jordan. The loss resulted in non-religious leaders of the Arab World giving way to more religious-oriented voices within their communities. The writings of Abul Ala Mawdudi, Sayyid Qutb and others found traction in a Muslim world searching for directions after the disappointment with Pan-Arabism. In a number of Muslim countries, governments began to adopt a more religious approach to the management and governance of their societies. As Islamic law was incorporated into criminal and civil justice systems, the Muslim state took over the legal realm by funding the Islamic court system. The state thus became purveyor, interpreter and executor of the law, effectuating a synergy of religion and customary tribal norms. As Wael B. Hallaq notes, this shift was possible because God revealed textual signs “…that form the speculative, hermeneutical basis of legal construction.” As the state, became more established as a political entity, it absorbed the responsibility for legal authority at the expense of the faqih (traditional legal scholars). The significance of this change becomes especially visible in situations in which the state is weak and rulers impose their will on the people. To address this gap, the rulers, who largely view themselves as the embodiment of the state, seek support for their authority.

---

217 Gerges, supra note 18; Lorenzo Vidino, The New Muslim Brotherhood in the West (2010); Mary Anne Weaver, A Portrait of Egypt: A Journey Through the World of Militant Islam (2d ed. 2001).
223 Amira Sonbol writes: “One of the main reasons for the change in treatment of women in modern Shar’i’ah courts is that when modern States built new separate Shar’i’ah courts, they did not apply precedents from pre-modern Shar’i’ah courts. Rather, modern States constructed legal codes compiled by committees, handed the new codes to qadis educated in newly opened qadi schools, and had them apply the codes in court.” Amira Sonbol, Women in Shari’ah Courts: A Historical and Methodological Discussion, 27 Fordham Int’l L.J. 225, 232-33 (2003-2004).
from either cultural leaders or, more commonly, religious leaders, establishing a unique alliance that necessitates mutual support.225

In Islamist societies, debates over private and a public are not particularly visible.226 Islamic law has incorporated cultural and traditional legal norms disguised as religious law with respect to women and their rights. Male domination renders the public-private dichotomy difficult to discern. Men define the bounds of private and public,227 and, male dominance within judicial and political systems, coupled with a willingness to apply the repugnancy clause213 when interpreting laws, ensures a propensity to rule against women and women’s rights that challenge patriarchy.228

The international community has participated in promoting Islamism by arguing that it does not wish to “impose” its liberal orientation on Muslim communities229 even though this has resulted in the removal or reduction of women’s rights. Although the international community desires to counter the rise of Islamism and empower women, it also seeks to avoid accusations of cultural imperialism. Thus, it frequently voices no resistance to the impact of Islamism on women. For example, Alexander Their, director of United States Agency for International Development’s (USAID) Office of Afghanistan and Pakistan Affairs, responded to inquiries about why USAID changed its $140 million land reform program designed to enhance women’s land rights in Afghanistan by stating: “The


226 Elizabeth Thompson, Public and Private in Middle Eastern Women's History, 15 J. WOMEN'S HIST. 52 (2003) (calling for greater discussion of the “public” and “private” in examinations of the history of women’s issues in Muslim societies).

227 In the United Kingdom, for example, Islamic courts have the authority to rule on Muslim civil cases, specifically, but not exclusively, cases relating to family law, including domestic violence among married couples, and financial disputes. Shari'a courts operate as arbitration tribunals. Abul Taher, Revealed: UK’s first official sharia courts, SUNDAY TIMES, Sept. 14, 2008, at 2. In Afghanistan and other countries in which the Constitution declares the country is an Islamic Republic (Art. 1) and no law can challenge Islamic law (Art. 3), the division between the private and public is non-existent. Islamic law is supreme.

213 Repugnancy clauses are “…constitutional provisions that, in language that varies from nation to nation, require legislation to conform to some core conception of Islam….” Haider Ala Hamoudi, Repugnancy in the Arab World, 48 WILLAMETTE L. REV. 427, 428 (2012).


229 Articles 39 and 41 of the 2005 Iraqi constitution, for example, empower local clerics to determine the extent of legal rights that women, including wives, mothers and daughters. Olivia St. Clair, Building Backwards: Helping Heal Iraq through Women’s Rights, 19 TEX J. WOMEN & L. 81, 82 (2009-2010). See also Katherine Metres Abbadi, Gender Justice in Iraq: Constitutional, Legislative, and Policy Concerns and Recommendations, 15 MICH. ST. J. INT’L L. 21 (2007).
women’s issue is one where we need hardheaded realism. There are things we can do, and do well. But if we become unrealistic and overfocused [sic.]…we get ourselves in trouble.”

IV. AFGHANISTAN AND WOMEN

Afghanistan has been in a state of persistent conflict since the 1970s. In 1973, Prince Daoud overthrew King Zahir Shah, ushering in a period of instability that became worse after the Saur Revolution of 1978. The 1979 Soviet invasion then led to a ten-year war. With the Soviet withdrawal, Afghanistan descended into further violence (akin to a civil war) as the different mujahedeen groups fought for supremacy. This period facilitated the rise of the Taliban, which in turn faced opposition from other factions such as the Northern Alliance. Following 9/11, a US-led international force invaded Afghanistan, erecting a new political system and engaging in low-intensity conflict against Taliban, Al Qaeda and other groups.

Afghan women, like most women in conflict, have endured immeasurable hardship and pain. Although conflict affects men and women differently,

---

230 Rajiv Chandrasekaran claims a senior US official announced, “Gender issues [in Afghanistan] are going to have to take a back seat to other priorities”. Rajiv Chandrasekaran, In Afghanistan, U.S. Shifts Strategy on Women’s Rights as it Eyes Wider Priorities, WASH. POST (Mar. 6, 2011), http://www.washingtonpost.com/wp-dyn/content/article/2011/03/05/AR2011030504233.html.

231 Prince Daoud adopted a very ambitious program of economic and social reform akin to Stalin’s infamous five-year plans that included the nationalization of banks and insurance as well as major reforms to agriculture, taxation, commercial and criminal law. David Chaffe, Afghanistan in Turmoil, 56 INT’L AFF. 15, 16 (1980); NANCY PEEBOD NEWELL & RICHARD S. NEWELL, THE STRUGGLE FOR AFGHANISTAN 47 (1981).

232 The Saur Revolution led to the emergence of the People’s Democratic Party of Afghanistan (PDPA). Primarily a student movement in the 1960s, the PDPA benefitted from the liberal policies of King Zahir Shah. It was supported by the Soviet Union and its aims were Marxist in nature as it advocated the transformation of Afghanistan into a communist state. Alam Payind, Soviet-Afghan Relations from Cooperation to Occupation, 21 INT’L J. MIDDLE E. STUD. 107, 113-14 (1989). The catalyst for Daoud’s overthrow was the April 17, 1978 assassination of prominent Parcham activist Mir Akbar Khayber. Khayber’s funeral drew thousands and the Daoud regime panicked, initiating a wave of arrests of PDPA members. On April 27, members of the PDPA and the military stormed Daoud’s palace, killing him and his family. William Maley, Afghanistan: An Historical and Geographical Appraisal, 92 INT’L REV. OF THE RED CROSS 859, 863 (2012).


234 Id.

235 See, e.g., Telesetsky, supra note 143 (recounting the limitations imposed on women under the Taliban); Sima Wali, Elizabeth Gould & Paul Fitzgerald, The Impact of Political Conflict on Women: The Case of Afghanistan, 89 AM. J. PUB. HEALTH, 1474 (1999) (highlighting the negative impact of conflict on the mental health of Afghan women).
conflict has only exacerbated the suffering of Afghan women. Thus, this section maintains that gender equality has failed to develop in Afghanistan not because of Islam or Islamic Law but because of cultural practices that keep women in a state of servitude by preventing them from acquiring education or independent employment. Men have strengthened the binding nature of cultural norms—many of which developed out of the continuous state of insecurity—by attaching a conservative interpretation of Islamic law to these cultural norms. As cultural practices are transformed into Islamic norms, it becomes more difficult to challenge these practices. Afghan culture, which positions women as guardians of the family’s honor and protectors of cultural heritage, also contributes to gender inequality. The burden on Afghan women is greater, in part, because a woman’s honor is conflated with familial honor. Geographical divides between the center (Kabul and the other major cities) and the periphery (rural society) also intensify misunderstandings about Afghanistan and Afghan women. As Huma Ahmed-Gosh notes:

Rural Afghanistan is the root of tribal powers that have frequently doomed Kabul-based modernization efforts. Social traditionalism and economic underdevelopment of rural Afghanistan have repeatedly contested the center (Kabul), thus a better understanding of tribal controlled areas is essential to empower women in these regions. For women in rural Afghanistan, control over their lives

---

236 During the campaign against the Soviet Union, women who had to escape to refugee camps in Pakistan and Iran often lost their homes and husbands to the fighting. When the war ended, Afghanistan descended into a state of civil conflict during which criminals frequently preyed on women. When the Taliban emerged, women were driven from the public space and were prevented from working or engaging in other activities that the Taliban deemed un-Islamic.

237 In a study on cultural values in Afghanistan, Nancy Dupree notes that the Soviet invasion placed greater emphasis on cultural values: “Torn from their protected home environments, the mostly rural refugees settled in kin-related groups for whom the preservation of cultural values was paramount. Upholding family honour and maintaining a good reputation in the eyes of the foreigners surrounding them was essential. Sadly, to many among the mujahideen (freedom fighters) who exercised power over these refugee populations, presenting the proper image meant imposing the strictest rules of physical and psychological seclusion on women, causing considerable strain.” Dupree, supra note 26, at 984.

238 Pashtunwali (Code of the Pathan), an informal justice system, for example, resolves conflicts between families by “giving” daughters. See Moghadam, supra note 13.

239 For an interesting, albeit somewhat controversial insight into the position of women in post-Taliban Afghanistan, see ASNE SEIERSTAD, THE BOOKSELLER OF KABUL (2004).


241 This was most evident in the Afghan refugee camps in Pakistan. SABA GUL KHATTAK, In/Security: Afghan Women Refugees, in WOMEN, SECURITY, SOUTH ASIA: A CLEARING IN THE THICKETS 112-33 (Farah Faizal & Swarna Rajagopalan eds. 2005).

and gender roles is determined by patriarchal kinship arrangements. These kinship relationships are derived from the Quran and tribal traditions where men exercise unmitigated power over women. While Islam is deeply entrenched in the country, a hybridized compromise of Islamic and secular ideals of gender relations, along with economic reconstruction of rural Afghanistan will be proposed as a process towards enhancing women’s status.\(^{230}\)

Competing views and narratives populate writing on Afghanistan; while some focus on the progress that has taken place since the Taliban period, others highlight the limited nature of development.\(^{231}\) Contemporary Afghanistan is also characterized by fluidity such that great variance exists among provinces and within provinces during different seasons.\(^{242}\) Writing about women in Afghanistan is further complicated by differences between theory and reality\(^{243}\) making it difficult at times to distinguish between fact and fiction.\(^{244}\) And, as Huma Ahmed-Ghosh argues, Afghan women’s approach to human rights differs from that of their western counterparts in that it is focuses more on religion and social norms as opposed to demand and gaining specific rights: “…[I]t is clear they want to reconnect and reunite with their families, lead good Muslim lives, and find work to support their families.”\(^{245}\)

---

\(^{230}\) Id. at 1.

\(^{231}\) Discussions about the education sector typify the two approaches. Although there has been a proliferation of education facilities and substantive growth in enrollment, the provision of education remains uneven and poor. See, e.g., Antonio Giustozzi & Claudio Franco, The Battle for the Schools The Taliban and State Education, AFGHANISTAN ANALYSTS NETWORK (2011), http://aan-afghanistan.com/uploads/2011TalebanEducation.pdf.

\(^{242}\) For example, there are less insurgent attacks during winter months due to inclement weather. C. J. Chivers, A Long, Hot Summer a New Fighting Season has Begun for U.S. Marines in Afghanistan, PITTSBURGH POST, May 23, 2010, at A4.

\(^{243}\) Carolyn Kissane, The Way Forward for Girls’ Education in Afghanistan, 13 J. INT’L WOMEN STUD. 10, 14 (2012) (Kissane maintains “there is a gap between the de jure right to education and the de facto ability to access it.”)

\(^{244}\) See, e.g., James Khalil, Neither Fact nor Fiction, SMALL WARS J. (Dec. 26, 2011), available at http://smallwarsjournal.com/jrn/l/art/neither-fact-nor-fiction-the-validity-of-opinion-polling-in-afghanistan. In a speech before the UN Commission on the Status of Women, Hussen Banu Ghazanfar, Minister of Women Affairs, pointed to nine key achievements in post-Taliban Afghanistan, which include: increasing the number of companies managed by women to over 700; a 25 percent increase in the number of women within the Afghan government; a 31 percent increase in the number of female teachers; and the establishment of Prosecution Offices on the Elimination of Violence against Women in ten provinces. H.E. Dr. Hussen Banu Ghazanfar Minister of Women's Affairs, Statement at Fifty-Seventh Session of the UN Commission on the Status of Women, New York (2013), available at http://www.un.org/womenwatch/daw/csw/csw57/generaldiscussion/memberstates/afghanistan.pdf.

\(^{245}\) Ahmed-Ghosh, supra note 8, at 123.
When focusing on the public-private divide when promoting norms of gender equality, claims concerning foreign intervention and influence emerge. Opponents of gender equality portray it as a western concept, a program designed to penetrate the private realm of Afghan society. Many Afghan men accept women serving in parliament or holding other public positions. Yet, they continue to resist changes within the private sphere. And, concerns with communal reputation blur the private-public divide in ways that contribute to the persistence of gender inequality. For example, support for the education of girls may be undermined by cultural or traditional norms that lead parents to fear that sending their daughter school may result in communal castigation. Carolyn Kissane points out that Afghan parents insist that only women teach their daughters; the scarce number of female teachers often hinders girls’ access to education. Similar issues surface with domestic abuse. In spite of calls to end such practices, others argue that it is an intrusion into the private realm and, therefore, outside the bounds of public discussions.

Ending discrimination and empowering women in Afghanistan is highly complex because it influences every facet of Afghan culture and history. Ideological...

---

248 The Afghan-born writer Nushin Arbabzadah captures the critiques of men concerning the western world’s approach to women’s rights: “Afghan families were far from perfect but they had the advantage of resting on centuries of tradition rather than relying on whimsical policies formulated in the distant cities of London, New York and Washington. Weighing up the pros and cons of individual liberation in a traditional society versus the merits of sticking to tried and tested traditions, most women opted for the latter.” Nushin Arbabzadah, Afghan Women Remain Wary of Politics—and Rightly So, GUARDIAN (Mar. 9, 2011), http://www.guardian.co.uk/commentisfree/2011/mar/09/afghan-women-politics-taliban-afghanistan.
250 Coleman, supra note 56, at 59-60.
251 Kissane, supra note 241, at 16, 19. (claiming: “...the fact that notions of democratic reforms are automatically held suspect by many of those in positions of formal and informal power within the country is both exacerbated by and exacerbates limited access of education for girls and women”).
253 Meri Melissi Hartley-Blecic suggests that King Amanullah’s reformist agenda and his wife’s behavior were instrumental in his overthrow. Meri Melissi Hartley-Blecic, The
differences across geographic space also pose challenges to addressing gender inequality.\textsuperscript{254} In sum, despite over a decade of international intervention in Afghanistan, many ordinary women remain second-class citizens, receiving no support or assistance from the state, while the international community, although speaking in favor of women’s empowerment, fails to act when evidence of mistreatment and abuse emerges.

\textbf{A. Afghan Women in the Post-9/11 Period}

Women in post-2001 Afghanistan are undoubtedly in a much better situation than they were under the Taliban, but it remains unclear how long this will remain.\textsuperscript{255} Many avenues previously closed have—in theory and in practice—opened up because the state no longer demands that women remain hidden from public spaces. The internationally led reconstruction program has focused on improving the lives of ordinary Afghans and particularly of women\textsuperscript{256} who were disproportionately impacted by decades of conflict and Taliban rule.\textsuperscript{257} Great emphasis has been placed on providing women with representation. The Afghan Constitution, for example, allocates seats to women to ensure that women have the same rights as men and to facilitate the adoption, promotion and enforcement of laws.\textsuperscript{258}

\begin{itemize}
\item \textsuperscript{255} \textit{See e.g.}, \textit{Violent crime against Afghan women hits record levels, says rights chief, AL-JAZEERA AMERICA} (Jan. 5, 2014) http://america.aljazeera.com/articles/2014/1/5/violent-crime-againstafghanwomenhitsrecordlevels.html (highlighting the rise in violence against women)
\item \textsuperscript{256} In his 2002 State of the Union address, President Bush declared: “The last time we met in this chamber, the mothers and daughters of Afghanistan were captives in their own homes, forbidden from working or going to school. Today women are free, and are part of Afghanistan’s new government. And we welcome the new minister of women’s affairs, Dr. Sima Samar.” \textit{The State of the Union Address, GUARDIAN} (Jan. 30, 2002), http://www.guardian.co.uk/world/2002/jan/30/usa?INTCMP=SRCH.
\item \textsuperscript{257} During the war against Soviet occupation, combatants in the civil war targeted women who had to endure sexual violence, abuse, forced marriages and kidnapping. When the Taliban rose to power in 1994, its various edicts prevented women from leaving the home unaccompanied by a close male relative, prohibited women from working in the public sphere (except health care) and banned all girls above the age of eight from attending schools. Religious police enforced these edicts through public beating. Laura Grenfell, \textit{The Participation of Afghan Women in the Reconstruction Process}, 12 HUM. RTS. BRIEF 22, 22 (2004).
\item \textsuperscript{258} This mirrors the development of western feminism, which focused on acquisition of the right to vote during its first wave. \textit{See, e.g.}, SANDRA HARDING, \textit{THE SCIENCE QUESTION IN FEMINISM} (1986); Chamallas, \textit{supra} note 84.
\end{itemize}
Decades of discrimination rooted in religion, culture and tribal practices have placed Afghan women in an almost impossible situation. Women must simultaneously challenge established cultural and religious norms, overcome a lack of education and economic rights, and grapple with pervasive insecurity arising from ongoing insurgency and criminal activity. Thirty years of conflict has created what Hussn Banu Ghazanfar, Minister for Women’s Affairs, terms a “morale of violence.”

Certain historical events assist in better understanding the position of women in contemporary Afghan society. Under the rule of Amir Abdur Rehman, known in Afghan folklore as the “Iron Amir,” the central authority challenged cultural and religious norms concerning women. Rahman, for example, abolished the custom of forcing a widow to marry her deceased husband’s next of kin, raised the age of marriage, implement a right to divorce under specific circumstances. Amir Habibullah Khan, who succeeded his father in 1901, continued the reformist tradition by putting a ceiling on marriage ceremony expenditures to prevent unnecessary extravagance while his wife appeared in public and wore western clothing. Habibullah also supported Mahmud Beg Tarzi’s effort to encourage women’s participation in the public sphere by establishing a school for girls with an English curriculum. In the 1920s, King Amanullah continued to expand women’s rights, but the process of reformation stymied with his abdication in 1929. Under Prime Minister Daoud, who served his cousin King Zahir Shah, Afghan women attained certain basic fundamental rights, particularly in the field of education. In 1959, in a highly controversial move, the wives and daughters of the Afghan royal family appeared unveiled in public. The first

259 Some suggest that improving education, literacy, and employment opportunities for women, along with training female health workers, will help reduce Afghanistan’s high maternal mortality rate. Pfisterer, supra note 42, at 62. And, Radhika Coomaraswamy discusses the positive impact of women’s land ownership: “[D]omestic violence might decrease if women have their own plot of land and their own economic resources. Women’s access to land will also give access to credit, information, and technology to work the land. Access to land also provides security against poverty in old age. With access to land, women's status and bargaining power will increase dramatically.” Coomaraswamy, supra note 97, at 504.

260 Ghazanfar, supra note 244.


262 Id. at 3.

263 Between 1911 and 1919, Mahmud Tarzi published a bi-monthly newspaper that included editorials and articles pertaining to women’s rights under Islamic law. Tarzi even devoted one section to accounts of Namwaran zanan-i jahan (Famous Women of the World). Ahmed-Ghosh, A History of Women in Afghanistan, supra note 63, at 2-3; Malikyar, supra note 160, at 392.

264 EWANS, supra note 233 at 127-32.

265 American diplomat Norman Hannah recalls encounters with Prime Minister Daoud in the late 1950s and early 1960s during which he saw a succession of cabinet ministers and their wives appearing before Prime Minister Daoud. Hannah writes that the wives were not wearing “traditional shrouds but, colorful flowing blouses and vests plus billowing shelvar—a kind of loose silken trousers fastened at the ankle-and, most important of all, no veil. All went immediately to pay their respects to the Prime Minister, whose wife also put in an appearance.” Norman B. Hannah, Afghanistan: Great Gamble, 6 ASIAN AFF. 187, 190 (1979)
Using Feminist Legal Theory in Explaining the Lack of Progress of Women’s Rights in Afghanistan: The Need for a State Strength Approach

Do not cite or copy. All rights reserved.

public unveiling since King Amanullah\textsuperscript{266} highlights how radical Afghan society was in the 1960s. The early 1960s were characterized by substantial economic reforms, such as road construction, and a more democratic constitution.\textsuperscript{267} The 1973 Daoud Revolution and the ensuing two decades of conflict, however, increasingly undermined the limited gains made by women. Such progress was reversed completely when the Taliban rose to the power in the mid-1990s. While Daoud and the PDPA government introduced measures that empowered women,\textsuperscript{268} the Taliban, with its unique brand of Islam, drove women from the public sphere, forbade women from working outside of the home and introduced a new moral code that more closely regulated the movement of women and diminished their rights.\textsuperscript{269}

This abbreviated history reveals that Afghan women had greater freedom to develop and participate in the public sphere before the advent of conflict, which was accompanied by rising Islamism and its contrived religious and cultural norms that have negatively impacted women’s position in Afghan society. In twenty-first-century Afghanistan, the construction of gender is understood in social, religious and cultural terms, a shift that makes the state less likely to address the marginalization of women.\textsuperscript{270} Understandings of gender also lead “…Afghan women [to] discuss gender in the context of social relations, Islamic religion, culture, domination, subordination and masculinity. They see gender as a process embedded in all social relations and institutions.”\textsuperscript{271}

The removal of the Taliban was supposed to usher in a new era for Afghan women.\textsuperscript{272} In the initial period following its removal, women anticipated greater

\textsuperscript{266} Hannibal Travis, \textit{Freedom or Theocracy? Constitutionalism in Afghanistan and Iraq}, 3 NW. U. J. INT’L HUM. RTS. 5, (2005) (exploring the incorporation of religion into the post-intervention constitutions of Iraq and Afghanistan and the countries’ transitions to Islamic democracy).

\textsuperscript{267} The process of the drafting the new constitution was significant. In 1963, a seven-man constitutional committee, which that included renowned, liberal Afghan activist Mohammed Siddiq Farhang, was established. Assisted by a French constitutional adviser, the committee, took a year to draft the constitution, which was then reviewed by a thirty-two-member Constitutional Advisory Commission. The 1964 \textit{Loya Jirga}, convened to review and formally approve the included 452 members, four of which were women. EWANS, \textit{supra} note 233, at 165.

\textsuperscript{268} Helena Malikyar notes that the Civil Law of 1977 stated that females are competent to marry at the age of sixteen and Article 27 of the 1977 Constitution established the principle of equality between men and women. Malikyar, \textit{supra} note 161, at 394-95.

\textsuperscript{269} Telesetsky, \textit{supra} note 143, at 293.

\textsuperscript{270} In a recent announcement, the Afghan Ulema Council issued a statement that men and women should not mix in the workplace; this position did not draw any condemnation from President Karzai. See Frud Bezhan, \textit{Karzai Backs Afghan Clerics Over Stronger Restrictions on Women}, RADIO FREE EUROPE (Mar. 8, 2012), http://www.rferl.org/content/karzai_backs_ahfghan_clerics_on_women/24507032.html.

\textsuperscript{271} ELSHEH ROSTAMI-POVY \textit{AFGHAN WOMEN: IDENTITY AND INVASION} 4 (2007).

\textsuperscript{272} Frida Ghiitis points out: “In the Afghan capital, deviating from the strictest interpretation of Islam may no longer be grounds for death, but as the day-to-day realities of post-Taliban life become apparent, it is clear that liberation from the tyranny of the Taliban is a relative matter. In the heady days following the overthrow of the Taliban, as the U.S. rejoiced in its victory, politicians pointed to the freeing of Afghan women as one
participation in the reconstruction discourse. Promises regarding the incorporation of women into Afghan public spaces and the process of drafting and ratifying the Afghan constitution created a sense of optimism. Slowly and assuredly, however, Afghan women have increasingly felt the enmity of tradition pushing back against their empowerment, many of the hopes that accompanied the 2001 intervention have dissipated and Afghanistan continues to be ranked as the worst country for women to live in.

1. The Afghan Constitution, Women and the Supreme Court

The US-led invasion of Afghanistan was accompanied by promises of improved conditions for Afghan women. The new constitution, drafted in 2003 and ratified in 2004, was touted as “the most enlightened constitution in the Islamic world.” According to Barnett Rubin, a former adviser to UN Special Representative for Afghanistan Lakhdar Brahimi during the 2001 Bonn talks and of the great victories of the war on terror.” Frida Ghitis, *Women Must Be Freed from Koranic Brutalities; Stoning and Other Ancient Penalties Can’t be Tolerated in the 21st Century*, L.A. TIMES, Aug. 21, 2002, at B13.

Under Article 83 of the Constitution, each province must have at least two female delegates elected to the Wolesi Jirga: “The elections law shall adopt measures to attain, through the electorate system, general and fair representation for all the people of the country, and proportionate to the population of every province, on average, at least two females shall be the elected members of the House of People from each province.” CONST. OF THE ISLAMIC REP. OF AFGHANISTAN, art. 83 (2004).

Laura Grenfell writes that out of the 1500 delegates who attended the Emergency Loya Jirga in 2002, whose purpose was to elect the Afghan Transitional Administration, 220 were women. In the 2003 Constitutional Loya Jirga, around 20 percent of the 500 delegates and seven of the thirty-five members of the Constitutional Commission were women. Grenfell, *supra* note 245, at 23.

In a 2003 report, the International Crisis Group noted: “The promise of an Afghan government committed to gender equality is so far more aspiration than fact. This gap between objectives and practices has several causes, including absence of effective governmental structures through which gender policy can be crafted and implemented; failure to acknowledge the deep social structures that incorporate inequitable gender norms; and absence of broad public support for such reforms.” INTERNATIONAL CRISIS GROUP (ICG), ICG ASIA REPORT NO. 48, AFGHAN WOMEN AND RECONSTRUCTION (2003), available at http://www.crisisgroup.org/~/media/Files/asia/south-asia/afghanistan/048%-20-%20Afghanistan%20-%20Women%20and%20Reconstruction.pdf.


a leading expert on Afghanistan, the 502 delegates to the Afghan Constitutional Loya Jirga (Grand Council) who approved the new constitution:

[h]oped that this relatively liberal Islamic constitution would provide a framework for the long task of consolidating basic state structures, as the country struggled to emerge from decades of anti-Soviet jihad, interfactional and interethnic civil war, and wars of conquest and resistance by and against the radical Islamists of the Taliban movement.267

Much of the campaign to end discriminatory practices relies on the law, specifically the adoption of legislation and its implementation. Accordingly, constitutions are fundamental as they highlight what values a society deems most precious. This section emphasizes the values the current constitution holds as most important before examining the judicial branch and its views on women and empowerment.280

Afghan constitutional history began on April 9, 1923 when the country adopted its first constitution. The constitution included a number of provisions that evidenced a desire to pursue neoliberal values, such as gender equality.281 A commitment to neoliberal norms also appears in the preamble to the 2004 Constitution, which affirms the country’s faith in both God and democratic values. This affirmation indicates the drafters’ desire to strike a balance between Islamic and neoliberal values.282 In principle, the Afghan constitution complies with international standards regarding gender and women’s’ rights, providing for constitutional guarantees of gender equality283 and the representation of Afghan women in Parliament.284 In spite of these constitutional provisions, the status of women remains weak in Afghanistan.285 Women continue to be killed for...
challenging Afghan cultural and religious norms. They also continue to endure domestic violence and encounter obstacles that prevent them from attaining equal rights.

Although this reality is the product of numerous factors, two have exacted the greatest influence: Islam and culture. Islam and culture are intertwined in contemporary Afghanistan, making it difficult to identify where culture begins and religion ends. Years of conflict, external interventions and a faith in religious solutions have linked Afghan cultural norms with militant interpretations of Islam. The dominant madhab (school of law) in Afghanistan since 1747 has been Hanifi. Mohammad Hashim Kamali, Chairman of the International Institute of Advanced Islamic Studies (LAIS) in Malaysia and a member of the Afghan Constitutional Review Commission (CRC), has argued that cultural practices have undermined women’s rights in Afghanistan. Kamali argues that “the ubiquitous practice of child marriage, exorbitant bride price (walwar), and dower (mahr), forced marriage not only of widows but also of adult boys and girls, and widespread abuses of guardianship powers” are largely customary rather than Islamic practices. The sale and exchange of women, also a customary practice not based on Islamic law, continues to take place in Afghanistan. The Afghan Ministry of Hajj and Religious Affairs has counseled patience in challenging this practice. According


See, e.g., Nazia Afghanistan, supra note 264 (recounting the story of a sixteen-year-old bride and the violence that she endured at the hands of her forty-year-old husband).

The killing of Afghan actress Benafsha in September 2012 provides a clear example of the violence women endure. Benafsha and two friends, in response to death threats, were in the process of relocating to a different part of Kabul, when she was stabbed outside of a Mosque. Her two friends were arrested and subjected to virginity tests. Emma Graham-Harrison, Kabul Attack on Female Actors Leave Survivors Facing More “Punishments”, GUARDIAN (Sept. 6, 2012), http://www.guardian.co.uk/world/2012/sep/06/afghanistan-attack-female-actors?INTCMP=SRCH.

Historically, Afghanistan was not known as a hotbed for Islamic militancy. Decades of conflict and foreign intervention, however, have fueled this development. See Ashraf Ghani, Islam and State-building in a Tribal Society of Afghanistan: 1880-1901, 12 MODERN ASIAN STUD. 269 (1978). See also EWANS, Supra note 233.

Malikyar, supra note 161, at 390-91. The Hanafi School is one of the four schools of Islamic jurisprudence within Sunni Islam named after Abu Hanifa ibn Thaby. It started in Iraq. Its influence expanded eastward so that it is the dominant school in Central Asia and the Sub-continent.


Id.
to Dai-ul-Haq Abed, deputy minister of Hajj and Religious Affairs, “[t]he phenomenon is decreasing but not eradicated.”

It is reported that one way in which Islam and culture come together to undermine women’s rights is through the punishment of women and girls that leave their homes without permission from their mahram (husband or male relative). What follows is that the individual is accused of running away from home enabling Afghan authorities to investigate the “crime” as an attempted zina (engaging in sexual intercourse outside of marriage) or as a ta’zir (crimes not mentioned in the Qur’an allowing for judicial discretion as they are design to prevent). Ultimately, what occurs in Afghanistan is that because this is a discretionary process, the police, prosecution and judges use their discretionary powers under the Afghan Penal Code to prosecute women for attempting to commit zina often on circumstantial evidence.

Since the U.S.-led invasion, the Afghan judicial system and its judges have been a disappointment in the struggle for women’s rights. The three institutions that oversee the judicial system—the Supreme Court, the Attorney General’s Office and the Ministry of Justice—frequently engage in turf wars. In fact, prosecutors, police officers and international advisors interviewed by the International Crisis Group in Kabul, Parwan and Nangarhar identified poor relations between the three branches as the primary cause of corruption and the weak rule of law. Corruption is rife. Judges are poorly trained by a

---

293 Shakeela Abrahimkhil, supra note 252.
295 Professor Coulson notes that the purpose of ta’zir which means to prevent is “to serve as a correction for the offender himself and as a deterrent for others.” N. J. Coulson, The State and the Individual in Islamic Law, 6 INT’L & COMP. L.Q., Vol. 6, 49, 53 (1957).
297 The Constitution provides for a three-tier judicial system comprised of the Supreme Court (Siera Mahkama), High Court (Appeal Courts), and Primary Courts. The Ministry of Justice is composed of two departments—a legal drafting department (the Taqnin) and a law department (the Hoquq). Each province and many districts have a separate law department that conducts preliminary investigations and often mediates cases before they are brought to court. The Taqnin is responsible for reviewing draft laws and national legislation to ensure compliance with the Constitution, Islamic law and international legal standards. The Office of the Prosecutor General, an independent body, is constitutionally charged with investigating and prosecuting cases. Reed, Foley & Hamed, supra note 277.
298 See Nusrat Choudhury, supra note 61, at 198 (“The structural characteristics of the Afghan legal system-the politicization and gender-bias of the judiciary, the weakness of the formal legal system, and the lack of clarity surrounding applicable law-render judicial review a serious threat to enactment and enforcement of women’s rights legislation. They also suggest the existence of serious institutional barriers to persuading judges to adopt understandings of Islamic and Afghan law that encompass women’s rights.”).
300 INTERNATIONAL CRISIS GROUP (ICG), ICG ASIA REPORT NO. 195, REFORMING AFGHANISTAN’S BROKEN JUDICIARY 13 (Nov. 17, 2010), available at http://www.crisisgroup.org/~/media/Files/asia/south-
judicial education system that requires law students to follow either a religious Islamic legal education or a non-religious-based legal education. The structure of legal training contributes to the lack of clarity regarding interpretation of laws and what type of law a judge should apply. Most judges interpret laws, especially laws addressing gender issues, conservatively. The limited authority of the Afghan Supreme Court also affects the empowerment of women. The Supreme Court “has limited administrative authority in the provinces, and even less ‘legal’ authority—in the sense that it does not cast a legalistic or intellectual shadow over the judiciary as a whole.” The court, which has nine justices, all of whom are men, consistently fails to promote, protect and enhance women’s rights. The Court’s conservative religious agenda dates back to its first chief justice, Fazl Hadi Shinwari, a religious conservative who lacked both legal and formal religious training. Shinwari’s appointment came out of political consideration, as he was an ally of


302 Lee, supra note 282, at 546.

303 Geoffrey Swenson and Eli Sugerman discuss deep structural flaws within the Afghan legal education system, claiming that no one, including the Afghan government, knows how lawyers practice in Afghanistan. Geoffrey Swenson & Eli Sugerman, Building the Rule of Law in Afghanistan: The Importance of Legal Education, 3 HAGUE J. ON THE RULE OF LAW 130 (2011).

304 The United Nations Assistance Mission to Afghanistan (UNAMA) has found that prosecutors and the Afghan National Police tend to refer cases to jirgas and shuras for advice or resolution. The Report notes that this practice “often undermined implementation of the EVAW law and reinforced harmful practices.” UNAMA, A Long Way to Go: Implementation of the Elimination of Violence against Women Law in Afghanistan 4 (2012), available at http://unama.unmissions.org/LinkClick.aspx?fileticket=Qy9mDiEa5Rw%3d&tabid=12254&language=en-US.

305 ICG, Reforming Afghanistan’s Broken Judiciary, supra note 284.


307 Nina Shea notes that soon after Afghanistan’s post-Taliban cabinet was announced, the Fazul Hadi Shinwari denounced Sima Samar, Afghanistan’s first Minister of Women’s Affairs for speaking out “against the Islamic nation of Afghanistan.” Samar was charged with blasphemy for allegedly telling a Canadian that she did not believe in shari’a. Nina Shea, Sharia in Kabul? NAT’L. REV., Oct. 28, 2002, at 20.

President Karzai. He brought a tremendous conservative (religious) support because he was previously a head of a madras, a position that fostered his acceptance among clerics and mullahs around the country. Although Shinwari has left the bench, many of his judicial appointees (who also lack a legal education) remain on the bench and the Court has maintained its conservative attitude towards religious freedom, freedom of expression and gender equality. The Court, for example, has concluded that Article 42 of the Law on the Elimination of Violence against Women, which prohibits the postponement, pardoning or reduction in sentence for those found guilty of committing an act of violence against women, breaches the Afghan constitution. The Court has continued to undermine women’s rights when it August 2010 issued Supreme Court Approval 527, designed to provide guidance to prosecutors engaged in the potential prosecution of women accused of attempted zina. However, instead of calcifying the situation, what the measures has done is provided the police and prosecution with the authority to examine the purpose as to why the woman had run away, as opposed to accepting that preventing a woman from leaving her home without permission is a fundamental breach of her right, leading UNAMA to note the investigator needs to determine “a female’s marital status and the place from where she ran. Though her motive for leaving is considered, there is no instruction to investigate the potential perpetrator of violence against her should it be concluded the woman fled her home due to violence. In most cases, unless a woman or girl is able to prove that she left her house to escape violence and went to an institution deemed appropriate (i.e., a DoWA), she is suspected of “attempted zina.”

2. The Afghan Ministry of Women’s Affairs (MoWA)

The 2001 Bonn Agreement paved the way for the establishment of an Afghan Ministry of Women’s Affairs (MoWA). The Ministry was entrusted with the duty of advancing the role of women in Afghan society and the responsibility of coordinating government initiatives to promote the inclusion of women in

---

309 Carlotta Gail, Afghan Lawmakers Review Court Nominees, N.Y. TIMES, May 17, 2006, at A.10
310 In a 2010 report, the International Crisis Group stated that the Supreme Court operates as a bully pulpit for Islamist fundamentalists linked to Saudi-backed jihadist Abd ul-Rabb al-Rasul Sayyaf. ICG, Reforming Afghanistan’s Broken Judiciary, supra note 284.
313 Id., at 23.
Afghan social life. Although MoWA was created to help end gender inequality in Afghanistan, the fact that Afghanistan was recently identified as the worst country for women to live in suggests that MoWA has not been effective. Its ineffectiveness is arguably attributable to the nature of Islamic education in Afghanistan. Muslim feminists such as Fatima Gailani, president of the Afghan Red Crescent Society, identify the type of Islam taught in Afghanistan as the source of discrimination. Gailani also emphasizes the role of the family—the private sphere—in fostering discriminatory practices against women.

MoWA’s ineffectiveness can also be attributed to the difficult conditions under which it operates. MoWA has to contend with a fickle president and political system that does not value MoWA’s efforts to empower of women, treating it instead as a tool to appease the international community. Although President Karzai publicly supports the empowerment of women, he works with conservatives who oppose women’s empowerment to ensure his political survival. For example, Karzai supported the establishment of the Ministry of

---


316 See GENDER AND POST-CONFLICT RECONSTRUCTION LESSONS LEARNED FROM AFGHANISTAN, supra note 297.

317 In a 2007 interview Gailani stated: “In most parts of the country women face exactly the same discrimination they faced five years ago. This discrimination does not come from the government; it comes from their own families. Personally, I never think about my gender, whether I am in the Red Crescent or when I was recently working on the new Constitution. I had to go from village to village to speak to different people, sitting in the mosque talking to a congregation of men. I think that when you reach a certain level of education, people will respect you. But the dilemma is how to encourage fathers, brothers and families to give this chance to their daughters.” Franz Rauchenstein, Interview with Ms. Fatima Gailani, President of the Afghan Red Crescent Society, 89 INT’L REV. RED CROSS 7, 9 (2007). See also Justice for Women, DAILY OUTLOOK AFGHANISTAN (Apr. 16, 2012), http://lawezproxy.syr.edu/login?url=http://search.proquest.com/docview/1000394741?accountid=58843.


319 Pamela Constable noted the Karzai administration supported a campaign to clamp down on vice “in response to pressure from domestic religious leaders and partly to upstage Islamic Taliban insurgents who are stepping up attacks across the south.”
the Hajj and Religious Affairs (MOHRA) to prevent vice and promote virtue, much like the notorious Department for the Promotion of Virtue and Prevention of Vice.\(^\text{320}\) The MOHRA has been slow in addressing un-Islamic customary practices, such as the selling of women.\(^\text{321}\) Questions remain regarding its commitment to reforming Afghan Islamic practices that have morphed over decades of conflict,\(^\text{322}\) especially because the Ulema Council continues to wield enormous influence.\(^\text{323}\) MoWA also operates with limited funds\(^\text{324}\) and does not enjoy the same stature as the Department of Defense, the Interior Ministry or the Education or Health Ministry.\(^\text{325}\) Suggestions that the minister owes her position to the president has not helped matters. Such beliefs foster concern that the minister will pursue the president’s agenda\(^\text{326}\) while failing to address issues of competency, corruption and accountability that have characterized the Karzai administration.\(^\text{327}\) MoWA’s agenda has been shaped by cultural and traditional

---


Christina Lamb, “Ministry of Vice” Fills Afghan Women with Fear, SUNDAY TIMES, July 26, 2006, at 23.


See, e.g., HUMAN RIGHTS, U.N. ASSISTANCE MISSION IN AFGHANISTAN (UNAMA HR) & OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR HUMAN RIGHTS, *Harmful Traditional Practices and Implementation of the Law on Elimination of Violence against Women in Afghanistan* 1 (Dec. 9, 2010), http://unama.unmissions.org/Portals/UNAMA/Publication/HTP%20REPORT_ENG.pdf (“Afghan men and women interviewed by UNAMA HR reported that many Afghans believe that practices that subordinate women to the will of men and sharply limit their realms of activity, originate in the Holy Koran.”).


In 2011, fourteen Afghan ministries received direct assistance from USAID and the State Department. According to information provided to the US Senate Committee on Foreign Relations, the following ministries receive U.S. aid: Ministry of Finance ($30 million), Ministry of Communications and Information Technology ($1 million), Ministry of Public Health ($236.5 million), USAID Salary Sup Special Posts ($2 million), Ministry of Agriculture, Irrigation, and Livestock, Independent Directorate of Local Governance ($85 million), Ministry of Finance and World Bank ($2,079.5 million), Ministry of Education ($25 million through Danish Development Agency), Ministry of Transportation and Civil Aviation ($6 million). No information was provided for the Ministry of Counter Narcotics, Ministry of Women’s Affairs, Ministry of Justice, Attorney General’s Office, or Ministry of Interior. MAJORITY STAFF OF S. COMM. ON FOREIGN REL., 112TH CONG., *Evaluating U.S. Foreign Assistance to Afghanistan*, note 69 (Comm. Print 2011).

See, e.g., Manizha Naderi, *This is a Blatant Bid to Curb the Rights of Afghan Women*, THE TIMES (UK), Feb. 16, 2011, at 20.

Reportedly, it costs around $100,000 to become a provincial police chief, $25,000 to settle a lawsuit and $6,000 to bribe the police. Dexter Filkins, *Afghan Corruption:
norms, the rising level of Islamism and the politicization of women’s rights.\textsuperscript{328} Because women remain in the margins of society,\textsuperscript{329} MoWA focuses primarily on resolving abuse and elopement and opening training centers in select areas of the country.\textsuperscript{330} Donors have not effectively intervened to help improve the situation; most provide aid to specific programs\textsuperscript{331} or do not provide enough aid.\textsuperscript{332} They rarely consult with the ministry and programs are often subsumed by political debates about the rights of women.\textsuperscript{333}

3. The Law on Elimination of Violence against Women (EVAW)

In August 2009, Afghanistan adopted the EVAW, which is designed to protect women and girls.\textsuperscript{334} President Karzai, who introduced the measure as an executive decree, signed EVAW into law six years after his interim government ratified—without reservations—the Convention for the Elimination of Discrimination against Women (CEDAW), which Babark Karmal had signed on

\begin{thebibliography}{99}

\bibitem{328} Some claim that the Afghan Ministry of Information and Culture called on women TV presenters to avoid heavy makeup and wear headscarves in February 2012 to show the Taliban, with which it was seeking to open negotiation, that the government’s agenda comported with the Taliban’s commitment to institute Islamic precepts. Mina Habib, \textit{Afghan Clerics’ Conservative Blueprint for Women}, INSTITUTE FOR WAR & PEACE (Mar. 7, 2012), http://iwpr.net/report-news/afghan-clerics-conservative-blueprint-women.

\bibitem{329} During the 2009 election, for example, “a combination of fear, tradition, apathy and poor planning conspired to deprive many Afghan women of rights they had only recently begun to exercise.” According to reports, insecurity prevented women from voting in many districts. As a result, some men voted on behalf of women. Pamela Constable, \textit{Many Women Stayed Away From the Polls In Afghanistan; Fear, Tradition, Apathy Reversed Hopeful Trend}, WASH. POST, Aug. 31, 2009, at A1.


\bibitem{331} Roya Rahmani, \textit{Donors, Beneficiaries, or NGOs: Whose Needs Come First? A Dilemma in Afghanistan}, 22 DEV. IN PRAC. 295 (2012) (noting that donors’ lack of understanding of local context has a detrimental effect on local NGO work). Isobel Coleman notes that total USAID funding for educational initiatives between 2004 and 2006 was only $100 million, most of which was devoted to handicap-accessible, earthquake proof school construction. Isobel Coleman, \textit{supra} note 56, at 61.


\bibitem{333} The is evident in the debate about who should manage women shelters. The Afghan government depicted the shelters as inefficient and corrupt because it wants to control these institutions. Manizha Naderi, \textit{supra} note 310. Others claim that foreigners use the shelters to convert Afghans to Christianity. Maria Abi-Habib, \textit{TV Host Targets Afghan Women’s Shelters}, WALL ST. J., (Aug. 3, 2010), http://online.wsj.com/article/SB10001424052748704875004575374984291866528.html.

\bibitem{334} UNAMA, \textit{supra} note 289.
\end{thebibliography}
August 14, 1980.335 The 2009 legislation criminalizes child marriages, forced marriages, the selling and buying of women for the purpose of marriage, the use of women and girls for conflict resolution, killing, torture, rape and other kinds of violence,336 forced isolation,337 forced self-immolation338 and denying women the right to education, work and health services. 339 EVAW also prescribes preventive measures340 for implementation by seven Government ministries.341 In 2013, Fawzia Koofi, a member of the Afghan Parliament introduced EVAW, arguing for its adoption as a legislative measure instead of a presidential decree that can be reversed by a subsequent president. 342

Debates surrounding EVAW have highlighted the continued pervasiveness of misogyny and contrived cultural values. Those who opposed EVAW claimed that it contravenes Islamic law,343 particularly provisions criminalizing child

336 Justice for Women, supra note 309.
337 Article 31 declares: “It is a crime to isolate a woman in the home, or from her relatives.” It further states: “The offender may be sentenced to a maximum of 3 months in prison.” EVAW, supra note 305.
338 “It is illegal to mistreat women in ways that push them to burn themselves, swallow poison, or commit suicide. The punishment is more severe if the woman suffers injury or disability from these actions.” EVAW, art. 21, supra note 305.
339 “Preventing or forbidding a girl or a woman from attending school or university, from working outside the home, or from visiting doctors for treatment is a crime. It is against the law for a father, brother, husband, any relative or stranger to prohibit women’s access to education, work, or medical care. A person who does that will be punished with up to 6 months in prison.” Id., art. 35.
340 These measures refer to such actions as the prevention of violence (art. 4) which the law calling for the punishment of the offender. Moreover the act states that the infliction of violence whether in public or private area is prohibited. The Act also called for protective and supportive measures thus under art. 8, MoWA in cooperation with other government ministries and agencies should help increase awareness as to the rights of men and women, highlighting the obligation to end violence against women. 2009 Law on the Elimination of Violence against Women.
343 Saleha Soadat, Law on Elimination of Violence against Women Dropped by Parliament, TOLONews (May 18, 2013),
marriage and forced marriage, banning the traditional practice of exchanging girls and women to settle disputes, making domestic violence a punishable crime, protecting rape victims from prosecution for adultery, limiting the number of wives a man can have to two and establishing shelters for battered women.\textsuperscript{344} The key issue with the legislation is that it permits a victim of violence to approach the Police, the Afghan Human Rights Commission, the Department of Women’s Affairs or prosecutors and it appears that there is a great demand to mediate the situation as opposed to prosecute, largely because this is deemed to challenge the family unit.\textsuperscript{345} Additionally, what is also troubling about the legislation is that if a compromise is reached after a conviction, the sentence is not imposed.\textsuperscript{346}

A 2012 study by UNAMA examining the presidential decree discussed some indicators of progress, but concluded that “the overall use of the law remained low indicating there is still a long way to go before women and girls in Afghanistan are fully protected from violence through the law.”\textsuperscript{347} The report included three additional key findings (not including an increase in violence against women) that expose the limited impact of EVAW on women’s empowerment in post-Taliban Afghanistan: (1) police and prosecutors frequently rely on traditional institutions controlled by powerful men to resolve violations; (2) women who turn to traditional institutions to resolve domestic disputes often remain at risk because tradition dictates that women who flee abuse must be returned to their families; (3) officials remain reluctant to arrest individuals accused of violence against women if they are connected to armed groups, including government-sanctioned groups such as the Arbaki, Afghan Local Police (ALP).\textsuperscript{348} In December 2013, a new report was issued and its finding are troubling because they emphasized “that encouraging increases in reporting and registration of incidents of violence against women by police and prosecutors did not lead to a similar increase in the use of the EVAW law to resolve cases by prosecutors and courts particularly through criminal prosecution.”\textsuperscript{349}

The principal piece of legislation adopted to protect women and, by extension, promote and cement their rights has clearly failed. Domestic violence has

\textsuperscript{344} For example, Obaidullah Barekzai, a Member of Parliament from Southeast Urozgan Province, asserted that the prohibition against allowing parents to marry their daughter if she is under the age of sixteen contravene Islamic law and practices. Barekzai claimed that Hazrat Abu Bakr Siddiq a companion of the Prophet Mohammed, married off his daughter when she was seven. \textit{Controversy Over Elimination of Violence Against Women Law}, \\ \textsc{Daily Outlook Afghanistan} (May 21, 2013), http://www.outlookafghanistan.net/editorialdetail.php?post_id=7420.

\textsuperscript{345} UNAMA, \textit{A Long Way to Go: Implementation of the Elimination of Violence against Women Law in Afghanistan} (2013).

\textsuperscript{346} Id. at 12.

\textsuperscript{347} UNAMA, \textit{A Long Way to Go}, supra note 300, at 9.

\textsuperscript{348} Id. at 4.

\textsuperscript{349} UNAMA, \textit{A Long Way to Go: Implementation of the Elimination of Violence against Women Law in Afghanistan} (2013).
increased and violence against women continues to go either unpunished or under-punished. MoWA lacks the influence necessary to impose its agenda on Afghan society and men continue to control the discourse about women’s rights. Women’s rights remain under attack.

B. Non-Governmental Organizations and Afghan Women: RAWA

The role of Afghani and international NGOs in enhancing women’s rights has increased since the 2001 US-led invasion. Domestic and international NGOs have enjoyed a greater freedom to operate than they did under the Taliban and have been instrumental in helping many Afghan girls and women access education and employment. The extent of this access, however, remains underexplored and successes are difficult to gauge. Afghan women activists, including those affiliated with international NGOs, work in a challenging environment that renders it difficult to provide a comprehensive review of all work within the NGO sector. The Afghan NGO community adheres to Muslim feminism, but some of its members take a more Islamist stance and others strive to balance international human rights norms with Afghan and Muslim values.

The Revolutionary Afghan Women Association (RAWA), a leading Afghan NGO, was established in 1977 by Afghan poet Meena Kishwar Kamal to


352 The International Development Law Organization (IDLO) has been instrumental in establishing Violence against Women Unit within the Attorney-General Office. Since its opening in 2010, the Unit has received 237 cases, an average of 26 monthly. with an average monthly case of 26 (December 2010). The monthly caseload has nearly doubled since the Violence Against Women Unit was established. IDLO has also published a booklet describing crimes against women. INT’L DEV. LAW ORG., 2010 ANNUAL REPORT 6 (2010), available at http://www.idlo.int/Publications/AR2010_En.pdf.

353 Telesetsky, supra note 143.


355 In June 2012, the Afghan Justice Minister for example claimed that women’s shelters encourage “immorality and prostitution.” Graham Bowley, New Worries About Women’s Rights and Ethnic Tensions Emerge in Afghanistan, N.Y. TIMES, June 20, 2012 at A8.

356 Parliamentarian and activist Fawzia Koofi argues that one way to improve the lives of women is to engage with the religious polity. She stated: “The role of the mullahs is crucial because we’re an Islamic nation and the mosques are being used against women…” Miram Arghandiwal, Afghan Women, Clerics, Eye Unlikely Alliance to Improve Rights, REUTERS (Jul. 16, 2013), http://www.reuters.com/article/2013/07/16/us-afghanistan-women-idUSBRE96F0CF20130716.

facilitate the participation of Afghan women in all aspects of public life. To understand RAWA and place it in context—whether within the Afghan social, political and cultural system or in relation to feminism—it is important to appreciate that RAWA did not begin as a political movement. RAWA has taken and continues to take the position that acknowledging the social, cultural and religious limitations that Afghan women face on a daily basis would render it easier to provide Afghan women, mainly in rural areas, with rights. Accordingly, RAWA constantly strives not to offend or challenge certain religious or tribal norms. Therefore, RAWA has engaged political discourse through its involvement in the social sphere, but remains conscious of Islamic principles while eschewing Islamist interpretations. RAWA helps women to recognize that the treatment of women is unacceptable and mobilize to bring about positive change.

RAWA remains outside the public political centre while enacting patriarchal reforms within kinship groups and through politically charged social programmes within the spaces of its private and clandestine operations. These political strategies, at times, mirror conventional and conservative methods for socially reproducing the organization’s future membership and developing “citizens” for its idealized and ideologically constructed feminist nation.

The key challenges faced by RAWA in post-Taliban Afghanistan are substantial and have been impacted by the shifting nature of the public-private divide. During the period of Soviet Jihad and the Taliban, RAWA had to work quietly and out of the public eye in order to provide women with basic support. In the post-Taliban period, as lines between the private and public have dissipated, RAWA members have had to take a more careful line to avoid the accusation that they pose a challenge to Islamic precepts. In 2004, for example, Abdul Latif Pedram, a left-leaning writer raised the issue of divorce and polygamy at a women’s forum while campaigning for president by suggesting that a husband cannot treat four wives equally. Safia Siddiqui, a political activist and member of the group that sponsored the forum, reacted by claiming that Afghans do not wish to discuss such issues. Siddiqui stated: “These are our Islamic values, and...”

360 In the words of one activist, RAWA “respect[s] Islam. But while any fundamentalist force rules Afghanistan—whether it be Taliban or Jehadis (such as the Northern Alliance)—democracy and secularism cannot be achieved.” Chris Richards, *Interview with RAWA, New Internationalist*, June 2003, at 33.
361 Anne E. Brodsky, et. al. explore the concept of resilience in relation to RAWA. Their study highlights an initial need for greater consciousness among women and the subsequent need for intention, action, reflection and maintenance. Anne E. Brodsky et. al., *Between Synergy and Conflict: Balancing the Processes of Organizational and Individual Resilience in an Afghan Women’s Community*, 47 AM. J. COMMUNITY PSYCHOL. 217 (2011).
society will accept us only if we respect those values.”363 The space in which RAWA labors to sustain its activities also impacts which issues it chooses to address. It has, for example, shifted some of its focus to issues of health364 and children because they garner less attention and generate less controversy.365 RAWA occupies two spheres: one public (the Internet) and one private.366 RAWA’s website, which contains critical views about contemporary Afghan society, resonates with a wider audience.367 Within Afghanistan, however, RAWA activists communicating through more traditional means adopt a more temperate and vigilant attitude to avoid accusations of being anti-Islamic. RAWA’s programming must also conform to established gender roles. In its orphanages, for example, girls learn to sew and boys learn carpentry. The political goals of RAWA thus often “do not extend to the destabilization of gendered labour activities.”368

CONCLUSION

Discussing the women’s rights movement in the United States, former Supreme Court Justice Sandra Day O’Connor identified three core lessons. First, change has to come from the public, not courts or the legislature. According to O’Connor, reform has “a much better chance of succeeding when it follows, rather than leads, public opinion”369 because acquiring legal protection when society at-large does not understand its value means very little.370 In the case of Afghanistan, efforts must focus on encouraging men to see the value of changing

364 One could argue that RAWA has returned to its original focus of empowering women by providing women with healthcare and education. CHAVIS, supra note 348 at 55-66, 162-70 (2003).
365 Anne E. Brodsky et. al., The Hope in Her Eyes: The Role of Children in Afghan Women’s Resilience, 82 AM. J. OF ORTHOPSYCHIATRY 358 (2012) (discussing RAWA and the role of children as protectors; children actively support their mothers’ involvement with RAWA and allow mothers to disguise their activities).
366 Journalist Jon Boone notes that due to official disapproval RAWA “has many of the attributes of an underground movement.” Boone compares RAWA to a terrorist organization because it is forced to operate through a cell-structure that protects its 2,000 members. Jon Boone, Revolutionaries Within: Burqas Conceal Women’s Dangerous Battle for Rights: Underground Feminist Group has Cell Organisation to Foil Powerful Enemies, GUARDIAN, May 1, 2010, at 29. Fluri writes: “The limits of women’s empowerment are also bound by the physical structures and spaces controlled by RAWA.” Jennifer L. Fluri, supra note 344, at 46.
367 Michael Dartnell Post-territorial Insurgency: The Online Activism of the Revolutionary Association of Women of Afghanistan (RAWA), 14 SMALL WARS & INSURGENCIES 151, 167 (2003) (noting that “RAWA has operated its Website on the basis of a global vision, especially aiming at the US, UN, NGOs, sympathetic activists, and donors”).
368 Fluri, supra note 344, at 46.
370 Writing about Palestinian women, Adrien Katherine Wing argues that changing the status of women and enhancing women’s rights through the reinterpretation of Islamic principles requires social change, which is very difficult to obtain. Wing, supra note 140, at 198.
contrived cultural and religious precepts, including understandings of masculine identities. Such a process undoubtedly raises concerns because far too often it is the State through its institution that is the instigator of discriminatory practices. Nevertheless the issue is that in states such as Afghanistan it is very hard to institute change unless it is through the State and its institutions. The second lesson identified by O’Connor is that women’s participation in the political process is critical because it not only helps shape policy, but also inspires women to attain positions from which they can implement policy changes. When women occupy high official and national leadership positions, the domestic and international scene transforms. Recent attempts to diminish Afghan women’s participation in the political sphere are troubling and demand immediate domestic and international attention. The final lesson is that “change can occur only when members of a large group surmount their individual differences and unite in pursuit of a concrete goal.” As O’Connor aptly noted, “It has only been when we women have cast aside our differences and forged common ground that we have achieved meaningful change.”

Beyond restructuring the debate over women’s rights through the paradigm of Islamic discourse, which necessitates the use of Islam to challenge what are clear un-Islamic practices when it comes to women, the public discourse in Afghanistan must shift such that the empowerment of women as a question of State survival. Adopting measures such as EVAW without fostering acceptance

372 O’Connor, supra note 359, at 35 (stating “the visible presence of women in significant and powerful position has a real and tangible effect on the lives of other women striving to advance both personally and professionally.”
375 O’Connor, supra note 359, at 35.
376 Id.
377 al-Hibri, supra note 172, at 3.
378 See ANNE E. BRODSKY, WITH ALL OUR STRENGTH: THE REVOLUTIONARY ASSOCIATION OF THE WOMEN OF AFGHANISTAN (2003); CHAVIS, supra note 348; Fluri, supra note 344.
among the religious polity or reforming the judiciary only makes the campaign for women’s rights more difficult because religious and judicial actors will continue to oppose new measures. Furthermore, the economy and the role that women can play in stimulating economic growth is also worthy of focus, but without addressing issues such as attempted zina and the use of taz’ir women are unable to leave their homes without permission. Ultimately, though the issue of economic empowerment is presented primarily as a development or civil rights issues rather than an issue of state strength, which therefore means that insufficient attention is placed on economic empowerment.

Individuals have attempted to engage with MOHRA, even though the program lacks funds, because the Afghan government anticipates the withdrawal of international military support in 2014 and pending compromise with the Taliban. The Afghan government views a relationship with the Taliban, which has been reluctant to pursue the empowerment of women, as more important than gender equality. This may explain why Karzai has neither opposed some of the legislative changes that have weakened the positions of women, nor demanded substantial reforms within the judicial branch to address the failings of the courts. Other ministries, such as those of education and justice, and non-state actors, such as the Ulema Council, must also participate in the process because they receive more funding than MoWA and wield more influence. Empowering women and ending discrimination are state strength issues. Evoking state strength renders possible the adoption of a host of measures that otherwise would


380 Donors have accepted economic empowerment as a development or civil rights rather than women’s issue. See, e.g., Anne Simmons-Benton, Jessica Heinzelman & Jill Sackett, Economic Empowerment Strategies for Afghan Women, USAID AFGHANISTAN (March 2012).

381 A key recommendation of the 2010 UNAMA and OHCHR report is for MOHRA and MoWA to “develop and deliver training and awareness-raising programmes for mullahs, imams and religious teachers about women’s rights and the EVAW law. Religious leaders should speak out about harmful practices that are inconsistent with Islamic teaching and principles and hold open discussions among Sharia experts on Islam and women’s rights.” UNAMA, supra note 305.


otherwise be deemed offensive. The argument becomes not about women per se, but about protecting and promoting the existence of the state. In fact, when applying state strength to women issues, the state may argue that it too must challenge the public-private divide, turning issues that conservatives view as private into public issues. If the public-private divide remains in place, Afghanistan will never transition out of its fragile state status.