

The Complexity of Justice System and Women in the Contemporary Afghanistan

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Abstract: *Women in Afghanistan under Taliban rule were considered to be one of the most suppressed human in the world. Liberation of Afghan women was one of the main motives of US and Allies war against terrorism in Afghanistan. However, condition of women remains without much changes even after the downfall of Taliban rule and introduction of democratic government. The hypothesis of Afghan women inhuman condition by Taliban dictatorship proved wrong by condition of women under the present decade old democratic government of Afghanistan. The paper attempted to analyse the complexities, limitation and failure of the Afghanistan justice system in dealing with women rights. Its main focus is on informal justice mechanism that has been practice since its early history which is also plays very important role in contemporary society and justice system. The paper argues that the condition of women in Afghanistan has multi-factors and the main factor is the inefficiency of justice mechanism.*

Keywords: *Women Rights, Justice System, Customary Laws, Religious Laws, Pashtunwali, Jirga*

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Introduction

Afghanistan is a landlocked nation bordering China, Iran, Pakistan, Tajikistan, Turkmenistan and Uzbekistan. Afghanistan has extreme climate, rugged topography and limited natural resources. However, by its unique location mosaic of ethnic groups settled across the country. It has been a cross road of trades, religions, politics and civilizations of different peoples. It's also a strategic location for many neighbouring and powerful countries since its early history. Multi-ethnic society of Afghan has conflict interests that led to tensions and wars between ethnic groups. The internal ethnic conflicts lured external powers that have intention to get hold Afghanistan for their strategic interest and natural resources further worsen the state unstable and insecure. Afghan frequent conflicts and wars for almost three decades have suffered extraordinary devastation. Conflicts and tensions also played a central role in politics and are often associated with violent, discrimination, and various type of serious human rights violation. It weakens the state and political authority has been in the hand of ethnic armed groups and warlords. The warlords and armed groups in many regions have accustomed to act with almost complete impunity. They even involve in the affair of Afghan justice system especially in the informal justice system.

Practically, Afghan has dual justice mechanism i.e. formal (State) justice system with state enacted law and informal (traditional) justice system with customary laws. The complexity and inefficiency of the Afghan justice system appeared in both the state and the customary justice system even recently. The complexity of the Afghan justice system lies itself in dual legal system in a country. Both the systems have limitations to provide justice to all in needs. Sometime they came into conflicts and no meeting point for both the systems. There is no proper mechanism for accuses to avail the rights to fair trial, and defense. There are wide spread of arbitrary detentions and discriminations especially women by both traditional and state justice system in Afghanistan till today. At the same the Islamic state of Afghanistan has obligations and responsible to the Islamic laws and doctrines. Sometime the influence of Islamic laws is so strong that even state laws have to compromise.

The formal state justice system is still under construction. The state legal system is operating only in some urban centres where there are fewer problems of political instability and insecurity. Government could not control legal system fully in certain areas control by warlords and commanders. The state courts in rural area have no basic facility and proper infrastructure. The court officials including judges and prosecutors have limitation to access of applicable statutes and legal materials, and lack of qualify judge and practitioner to run the judiciary efficiently. The judicial officials and their proceedings are under the influence of the certain people who have power to intimidate or to threaten them or any other kind, directly and indirectly affects the state judicial system.

At the same time informal traditional justice system has no uniform and codified laws. It has no proper procedure and often influence by external actors. Thus, Informal justice system are stringently criticised by many for not consonant with the international human rights standard. There were many cases where verdict of traditional justice system resulted violation of women right in inhumane. Nevertheless, informal customary justice system play important role till today and even prefers than formal state justice system especially in the Afghan rural areas. Afghanistan is the country without strong and independent justice system therefore naturally there will be no proper law and order which ultimate vulnerable victim are women and children.

1. Brief Historical background of Afghan Legal System

Afghanistan was founded by Ahmad Shah Durrani in 1747 who ruled till 1773 with absolute power. During his time, the administration drafted a legal code and the courts were in the hands of the *ulama* (religious scholars) except the death penalty which was to be approved by the king or governor. After Ahmad Shah's rule tribal code *Pashtunwali* (Pashtun code of conduct) was remained the primary judicial basis though *shariah* courts existed in urban centres until the end of the nineteenth century (Mariam 2004). However, the important of Islamic gained during the time of Amir Abdur Rahman (1880-1901). Rahman took up Islam as a driving force for his centralised rule and made all laws to act in accordance with Islamic law and gave *shariah* importance over customary laws. (Etling 2003: 6).

The trend of secularization and modernization appeared again during the time of King Amanullah (1919-1929). Amanullah tried to secularize and introduced several reforms intended to modernize Afghanistan. He abolished the traditional veil for women and opened a number of co-educational schools. The statutory law of Afghanistan was introduced by him in the early 20th century and the codification of laws was done during 1960s and 1970s (Schneider 2007: 107). His endeavored for secularization later formed the basis for democratization and the promulgation of the 1964 constitution under Zahir Shah (1933-1973) (Etling 2003: 7).

There was also an attempt to introduce Soviet style judiciary by the Marxist government in 1978 with many alterations in Afghan laws and legal system. In the reign of Muhammad Daud in Afghanistan set up a one-party republican government based on social justice. He introduced the 1977 Afghan constitution with the intention of giving power to the majority-farmers, workers, and youths. After the Daub government, Marxist government continued the process of modernisation and secularization, and carry out the land reforms. However, attempt to introduce Soviet-style judiciary by the Marxist government was not successful due to the strong resistance of Afghan conservative.

The strong politicisation of Islam came backed during the *Mujahideen* resistance defending the country against the Soviet invaders between 1979 and 1989. After the defeat of

Soviet, the Islamic state of Afghanistan was formed and religious official took over the state political function. Nevertheless, the rivalries between *Mujahideen* groups and civil war created a problem of political stability (Mariam 2004). During this period of political instability from the year 1992 to 1994 Taliban emerged in the Afghan political scenario with the promises of greater security and an end to the civil conflicts. The Taliban after getting their foothold in Afghanistan established a theocratic regime under the leadership of Mullah Muhammad Omar who proclaimed himself “Commander of the Faithful”. Afghanistan is named ‘Islamic Emirate of Afghanistan’ introduced conservative interpretation of Islam and enforced strictly the Islamic religious laws largely based upon Wahhabism. One of the main objectives of the Taliban controlling Afghanistan was to establish Islamic states and rule on the basis of Islamic laws (Marsden 2002: 62). In the name of liberating Afghanistan from the influence of infidel rule and ideology, Taliban took the puritan policy. Though conservative Islamic rule comes to an end with the downfall of Taliban in 2001, believes and traditional practices remain as the remnant Taliban evokes in some part of the country.

2. Influence of Islam on Afghan Legal System

The major population of Afghanistan is Muslim with few Jews and Sikhs. Afghans have been strong believer of Islam. The *Sharia* (Islamic laws) attached to Afghan community as justice giving laws and it is also a way of life for them. From the formation of modern state Afghanistan has been ruled mainly under the Islamic law or rule by its influence. The Islamic law has been playing an important role in their state affairs and an important source of Afghan legal system. It has also to some extent has been incorporated as part of the law of the state and has given special place in Afghan constitution. In the 1931 Constitution Hanafi was made Afghan jurisprudence. In the Afghan 1964 Constitution prescribed that the state should conduct its religious ritual (Nawabi: 2004). Even after the introduction of the 1964 Afghan constitution, Islamic laws sometime come into conflict with the existing state enacted laws and customary laws (Lau 2004: 2) by their believe and it important to the Afghan society. In the 1977 Constitution, Islam was declared as the state religion of Afghanistan.

The strictest enforcements of Islamic laws were during the *Mujahedeen* Government of 1992–1996 and Taliban’s theocratic regime of 1996–2001 (AI Report 2003: 5). The New 2004 constitution of Afghanistan itself has given special place for Islam and Islamic law. The Preamble itself states that “with firm faith in God Almighty and relying on his mercy, and believing in the sacred religion of Islam.” The Article 1 and 2 of the constitution declared Afghanistan as an Islamic Republic and Islam as the sacred religion of Afghanistan respectively. The new constitution is Article 3 that states, “In Afghanistan, no law can be contrary to the sacred religion of Islam and the values of this Constitution.” The constitution also mentioned, in Article 17, requiring that the state adopt measures to the development of religious education, organizing and improving the conditions of mosques, madrassas and religious centres along with the promotion of education. These proved that till today Afghan legal system directly and indirectly influence the legal system of Afghanistan. *Sharia* remains as an important source of Afghanistan laws and the state laws cannot go against to the principle of Islam.

Thus, Afghanistan from its early history has no strong unified state justice system which was accepted by the whole Afghans. Afghanistan has been practicing two types of legal court i.e. the informal Islamic laws court and the formal state laws court before the introduction of unified courts by 1964 constitution (Amy Senier 2006:1). The criminal, family, personal case were appealed and resolved according to Islamic laws (*Sharia*). On the other hand the case of commercials, taxes, public servants and other government related cases were solved by state court. It has been taken up many steps to built strong unified control legal system by several

rulers. Only during the early 20th century the Afghan statutory law was introduced by the Amanullah and the codified laws during 1960s and 1970s (Irene Schneider 2007:107). Even after the unified court was introduced, the traditional, religious and tribal courts are popular in the rural and conservative families. In spite of the changes of regime, it does not affect much to their legal system until the downfall of Taliban.

3. Justice System in Afghanistan

Afghan Justice System can be broadly divided into formal and informal. The *Jirga/Shura* justice mechanism with the customary laws and the Islamic law (*Sharia*) are informal justice system while State legal system with the national law constitutes the formal legal system. In Afghanistan the Sharia laws are closely link with customary laws. Customary laws are dynamic and they are mostly oral tradition which incorporated Islamic laws during interpretation and proceeding. In spite of the introduction of statutory laws there were cases where judges apply Islamic laws, mainly because of the limitation in application of modern written laws. The customary laws and Islamic laws are also applied in the formal legal system especially in the sphere of family affairs. Above these laws there are pressures from the external organisations to enforce the international human rights, laws and conventions.

It has also different legal institution and Courts for monitoring and judging the cases i.e. traditional Jirga system and state judiciary system. Sometime it came into conflict in adjudication where there is no clear jurisdiction between these justice mechanisms. People are allowed to choice to redress their rights and grievances to any justice systems convenience to the individual. The customary laws and legal system are preferred by people even today especially living in the rural.

4. Afghan Informal Justice System

Afghanistan has an aged deep-rooted customary justice system which is perceived to be legitimate to the people. They have strong social code of conduct which has been traditionally practicing in day today life. Honour and dignity of the individual is linked to other members of their clan. Disobeying of the social code and traditional practices face harsh consequent. The tribal people of Afghanistan have also strong sense of community ties and social order. They have the principle of “Restorative justice” in most of the Afghan customary system (Senier 2006: 3). Their primarily aim in solving conflicts for social order and community harmony rather than punishing the culprits. Apology, forgiveness and reconciliation are the methods usually pursue in the traditional Afghan customary tribunal.

The legal history of Afghan tells about the important of informal justice system that has been significant even after the introduction of statutory justice system under governments and rulers. People have perception that formal justice system as foreign institution and considered irrelevant to deal with disputes. They prefer dealing their case in informal justice system as they are accustomed to the old customary laws even though it has negative features and outcome. Significant of the Informal justice system was prominent especially during war and conflict when state justice system break-down or incompetent to perform its functions. The IDLO Evaluation Reports 2008 shows that about 80 percent of all legal disputes are dealt with customary law in Afghanistan (IDLO Evaluation Reports: 2008). Some of the important factors which people preferred informal justice system are cheaper, faster and more accessible to the people than the formal justice system.

4.1. Afghan Customary Laws

An Afghan customary law is set of rules that have been traditionally practicing laws and regulations for social conduct and conflict resolution. It is their traditional perception of rights and morality which are obligated to a member of the community be followed and uphold. Its concept and value are influenced by Sharia laws and many principles are identical. Afghan ethnic groups have their own customary laws. In some regions where multi ethnic settled, they have similar customary law and traditional practices influence by dominion ethnic group. The Afghanistan central regions Bamyan, Orozgan, Wardak and Balkh where Hajaras are majority, and the southern and eastern region where Pushtun dominated have common customary laws. However, the Nuristan provinces the eastern part of Afghanistan where tribe like Kata, Kom, Kuslh, Parsoon, Ashkoon and Guar inhabit are governed by their own customs. In the case of the northern region diverse ethnic tribes of Tajiks, Uzbeks, Turkmens, Arabs, Ishmailis and Pushtun have own customs but sometime it does mingle together. There are several customs and traditional practices followed by different ethnic groups. Some of the major Afghan customary laws are in the following:

4.1.1. Pashtun Customary Laws

Pashtun ethnic group has one of the most developed customary laws known as *Pashtunwali* in Afghanistan. It is a traditional unwritten rule and regulation of Pashtun handed down from generations. It's a ways of life for Pashtun community which has been followed as set of rules from pre-Islamic times. The main principles of Pashtunwali are Justice, hospitality, love, forgiveness, self-respect, tolerance, revenge etc. It has personal obligation all Pashtun to protect and uphold Pashtunwali. The individual is expected to be strictly followed and in returns get honour, support, identity and protection from the community. They are responsible to protect fellow members of the community and even stranger who seek refuge. They try to strengthen strong bond of oneness and brotherhood. It's also popular among other community especially living under the regions or close to Pashtun.

4.1.2. The following are the main Principles of Pashtunwali

Nang (Honour): Afghans especially Pushtun have self-respect, sense of equality and autonomy. Self-respect, dignity and honour are very important for *Pushtun*. Every *Pushtun* have sense of equality and has strong feeling that they are not inferior to other fellow man. Pashtunwali seek and preservation of honour as it is great important for Afghan society. Honour of the family and tribe is responsible by the every individual. They together preserve honour and dignity of individual, family, clan and their tribe. It is an obligation for all to preserve, uphold and protect honour of individual, family and tribe honour. Anyone who defames or insult this honour evokes revenges and will bear penalty. In the serious case it may even lead to bloodshed and murder. Insult in any form whether to poor or rich cannot bear and refuse to submit to anyone.

Ghayrat/Tureh (Courage): Ghayrat/Tureh is one of the most important principles of Pashtunwali. Everyone must always be brave fighting against their enemy, defending their property, women, family and tribe. It is also means defending the honour (*Nang*) against the shame. Women has limited role in this code of chivalry however they help and encourage men especial during fighting in the war.

Itbar (Trust): The literal meaning of Itbar is trust. It is guaranteed assurance by un-written laws or conventions especially in the field of business including contracts relating sale, finance and disposal of property etc. The business transactions are verbal and witness by few especially village elders. It is also trust in God (*Isteqamat*) the one creator (God).

Sabat (Loyalty): Loyalty in Pushtunwali is another important factor that has to be in a family and among tribe members. Every individual is expected to be loyal and any one disloyal would be appalling disgrace to individual and their family.

Imandari (Righteousness): Righteousness is one of the important principles of Pushtunwali. Not only good though, words and deeds but also expected to strive to uphold it. It is also profess to respect to all living being and preserve environment. The destruction of environment and animal are against Pushtunwali.

Melmastia (Hospitality): The code Melmastia in Pushtunwali is hospitality and respect toward all kind of visitors of different religion, race, nationality etc. without expecting anything in return. Feeding of strangers and friends, giving gift and defending the guest from their enemy in the house or in the guesthouse (*hujra*) are also a part of *Melmastia*.

Women play a role of mediator as guest to enemy house to resolved conflicts. Women may also “call out” (*nariqawal*) the man whom she wanted to marry if she is forced to marry other without her consent. In such condition when woman comes to man house as a guest, that man is obliged to accept it and protect her.

Nanawatai (Asylum): It is an act of going to the house of someone seeking for protection against enemy or for forgiveness. It is also well-mannered way of surrender to their enemy seeking for refuge to his enemy resident. People seeking for asylum must help at any cost who so ever may be. Even law breaker must be protected until they were clarified and justified the situation.

Hamsaya: The actual meaning of the term Hamsaya stands for a neighbour. However, according to the Pashto it applies to a man who ran away from his home seeking refuge and protection to the elder of the other village from his or her enemy. It also happens to escape from poverty or blood feud. The villagers are obliged to protect and provide whatever he need if they accepted Hamsaya.

Lokhay Warkawal: The literally meaning of Lokhay Warkawal is ‘giving of a pot’. It is a protection of individual or weaker tribe from of hostile enemy. The needy seek Lokhay traditionally by offering goat or sheep to the protector(s) and if it is accepted they are obligated to protect and defend from the enemy.

Badragha: The act of escorting fugitive or a visitor to its destination and protecting them from their enemy is called Badragha. The enemy is not dared to attack by the fear of reprisals of the armed party who is escorting during badragha.

Balandra/Ashar: Giving hand to needy especially who seek for their help and in return offer feast to the villagers who extend their help.

Namus: The literal meaning of Namus is virtue. The term namus in Pashto popularly used as gender specified virtue i.e. women chastity, respectability, honour etc. Women virtue is correlated to virtue of male family members and tribe. Women virtue is as important as male virtue and is protected from vocal and physical harm at any cause. Thus, because of the important of women virtue in Pashtun society sometime namus is understood as women folk. The gender segregation in the society is to maintain the honour of women in Pushtun tradition.

Tor: Dignity and honour of women is very important in Pushtun society. Man or women who dishonour women dignity is vicious offend. Illicit relation, touching and even casting evil eyes on women can lead to serious punishment.

Purdah: Purdah literally means restrictions of men and women to enter into each other's space. However, Pashtun gives restriction to women whom consider as the defense of honour. The practices of *Purdah* have different ways among different communities. In some community, especially Afghan nomadic tribe veils only their face when they move out of their house. However, most of the case in Afghanistan women are veiled their whole body. Under *Purdah* in the extreme cases women were not allowed travelling alone, barred from education and health care etc. without escorting by male family member or close male relative.

Badal (Justice/Revenge): The literal meaning of Badal is to seek justice or take revenge against the wrongdoer. This implies revenge to injustices committed by anyone and any time if the wrongdoer still exists. The *Badal* (revenge) are permitted to certain limit in order to maintain the honour of the *Pashtunwali* (Kakar 2005:4). Justice in Pashtun has different concept, even a mere mock (Paighor) is regarded as an insult, which can only be redressed by shedding of the taunter's blood (if he isn't available, then his next closest male relation). This in turn leads to a blood feud that can last generations and involve whole tribes resulting the loss of hundreds of lives.

Baramta/Bota: The literal meaning of Bota is carrying away. Bota is carried out when debtor failed to give back his debt on time or intentionally refuse to repay to creditor. It is a traditional practice of taking cattle or one of his kids and kin. It's usually retained until the debtor repays or assured to pay in a specified timeframe.

Nanewatei: It is reconciliation of the conflict parties where they both forgive other for peaceful and friendly relation.

Teega or Kanray: It is some kinds of treaty or agreement declare by Jirga to stop bloodshed between the conflicts parties. During the period of this agreement any party violate the agreement have to face penalty endorse by the Jirga. The literal meaning of Teega is putting down of stone however no stone as such is place in the reconciliation.

Tarr: Tar is the inter-village and inter-tribe mutual agreement of certain matter. Any violator who entered in such agreement has no say or right for compensation of the retaliation by other party.

Mla Tarr: The literally means Mla Tarr is 'girding up of loins'. It is preparation for arm confrontation. Every individuals of the village or tribe who are capable of handling firearm join the armed confrontation against their enemies who attack/disgrace them, their village or tribe.

Ghundi: literal meaning of the Pushtun word Ghundi is political party. However, actually it is an alliance, bilateral agreement for mutual promotion of trade, defense, friendly relation etc. for their common interest. Ghundi is also sometime comes into being to fight against hostile neighbour or common enemy. In such agreement they unite and fight under one command.

Lashkar: Lashkar traditionally formed armed group to enforce traditional laws and decisions of Jirga. Lashkar also deploys in armed conflict for the interest of their community or tribe. Their numbers varies according to the purpose range hundreds to thousands.

Chigha: The literal meaning of Chigha is a pursuit party. The Chigha is other groups assemble to protect especially property, to pursuit lost or looted property, abducting an inmate, village raid etc. by bandit or enemy.

Meerata: Meerata is a criminal act which execution of the whole male members of a family to eliminate the line of inheritance. This usually done with the objective of gaining inheritable property like lands, houses and other assets of the victim family by the stronger member of their family. This happen to relatives whose property can be transfer to them. Meerata is a cold-blooded murder and accused cannot escape from the rigorous penalty such as setting fire of the accused houses and other property, expulsion from the villages etc. by the immediate decision of Jirga.

Saz: The customary practice of compensation or penalty for bloodshed or murder or serious crime to end enmity of the conflicts parties is known as Saz. It is compensated in the form of money or in the form of giving girl(s) in marriage to the victim family. The custom of giving girls is also known as *swarah* and *swarah* is for blood relation in the conflicting parties so that the enmity could be removed, have cordial and peaceful co-existence.

Personal Autonomy: The other important principle is personal autonomy. The strong code of equability and autonomy in Pashtunwali made difficult to implement and control fully by state and its regulation. At the same time strict implementation of Pashtunwali is in the rural areas of Afghanistan where they have no full control by the state.

The decisions of the village council (*Jirga*) are laws for the people of this region (The International Legal Foundation Report 2004: 8). Although, some of these principles have negative features, it seeks peace and harmony. It is also given a provision in the constitution that courts may rely on the customary law where State law cannot solve any case provided it does not contradict the provisions of the state law or the Islamic principles of justice. The justice system of Afghanistan still depends on the customary law and traditional practices in solving many criminal cases and conflicts.

4.2. Afghanistan Informal Justice Mechanism

Afghan has traditional council for decision making and conflict resolution. It has been traditionally practicing before the introduction of the modern political system in Afghanistan. The council are categorized in three types i.e. the local, tribal and national council according to an important of the issue on which the decision they are going to be taken. The type of traditional council varies from region to region and community to community. The traditional council of Pushtun known is as Jirga. Jirga is also used by different ethnic groups and the most popular in Afghanistan. There are also non-Pushtun councils like Shura, Shura-i-islahi, Shura-i-Jammakhama etc. similar to Jirga. They have the similar informal mechanism of decision making and conflict resolution. The main sources of law used in these councils are their customary laws.

In Afghanistan today traditional council mainly deals with the dispute related to family, land, property, crimes, etc. on areas where there is no proper functioning of formal justice system. There are negative aspects of the Afghan informal justice mechanism. And there are also

loopholes for external actor(s) to involve or influence system for their vested interest in the adjudication of informal justice.

Jirga: The original term Jirga is defined by many scholars in different ways. However, it has commonly understood as the gathering of people to resolve dispute with common consensus (Wardak 2003: 3). It is a tribal traditional council where people come together i.e. elders, *Ulema* and prominent figure in the society to take decision of any matter. It is traditionally associated with Pushtun however Jirga plays important role in solving the conflicts on request even of the non-Pushtuns. Ali Wardak divides Jirga into three levels; the Maraka at the local level, Tribal Jirga at the tribal level and Loya Jirga at the national level (Wardak 2003).

Maraka: It is an informal mechanism of conflict resolution more or less has similar features of *Jirga*. Sometime the term *Maraka* and *Jirga* are used interchange. However, *Maraka* deals with smaller, less serious conflicts and criminal matters mostly at the local inter-village level. *Maraka* have four important elements i.e.

- i) *Narth* (Customary laws): *Narth* are civil and penal tribal customary laws that apply in the decision making and conflict resolution.
- ii) *Marakachain* (Members of *Maraka*): The members of *Maraka* consist of *Mashran* (elders), *Speengiri* (people with grey beard) and *Speenpatkian* (Mullahs).
- iii) *Institutional ritual*: The ritual is different in different case. Usually before the proceedings of *Maraka* reciting verse(s) of *Qura'an* is done and ends with prayer.
- iv) *Prikra* (Final decision): The final decision of *Maraka* aims for the satisfaction of both parties on conflict. The disobedience of the *Prikra* are fined (*Nagna*) or excommunicated from the community. If any one of the parties is dissatisfied with the decision taken by *Maraka* they can appeal to another *Maraka*. If the *Maraka* proved wrong in the application of the *Narth* then the *Maraka* have to compensate the victim party known as *Tawan* (compensation) (Wardak 2003 : 9).

Qawmi Jirga-Tribal Jirga: It is also a similar informal institutional justice mechanism with that of *Maraka*. But here it deals mainly with the problem related to the social order of the tribe in the level of inter-tribal. The *Qawmi Jirga* takes up and solve problem of more serious and important matters between tribes. The features of Qwami Jirga are similar with that of the *Maraka* i.e. *Narkh*, *Marakachian* (*jirgamaran*), institutionalised ritual and *Prika* (*Tarun*). However, the *Qwami Jirga* is a more structured institution with more prominent, qualified personnel and popular regional religious leaders as it members and stronger enforcement of *Narkh* mainly along the tenets of *Pushtuwali* (Ibid: 10).

The proceeding of the more or less same *Maraka* but the difference is that final decision (*Prika*) of the *Qwami Jirga* is done on the basis of consensus for their main aim is social order in their tribal community rather than solving the particular conflict. If the *prika* is not satisfactory or *jirga* break down then it can be reconvened three times. The third *Jirga's* decision is the final *Prika*. Every free male of the tribe are allowed to take part in the proceedings of the *Qwami Jirga* and thus brought a sense of equality. The process of *Qawmi Jirga* like that of other *Jirga* communicates to their community the social order based on the customary laws especially the *Pushtuwali* and *Prika* that binds the whole community over and above their kinship ties.

Loya Jirga: It is the Grand National Assembly gathered to discuss the matter of national importance and take national consensus. The *Loya Jirga* usually is held to discuss and draws

the solution on the social and political perspective for the national unity and sovereignty. The assembly is mainly of the tribal leaders, prominent figures in the society and the elders. All members have equal rights, free and calm discussion in the *Jirga*. Previously women and children were not included in *Jirga* whom they consider as “potentially disruptive elements” (Kakar 2005: 4). However, women for the first time participated in the 1964 *Loya Jirga* (Wardak 2003: 13).

4.2.1 Non-Pushtun Council

There are traditional councils of other ethnic groups with similar function of *Jirga* in Afghanistan. Some of the popular traditional councils are as follows:

Shura: It is a council of non-Pushtun ethnic of Afghanistan. *Shura* is an ad hoc assembly that meets for certain need or to resolve certain conflict. It is ad hoc assembly of village elders, clerics and prominent political leaders as their members to mediate and judge conflicts.

Shura-i-islahi: The Tajiks, Uzbeks, Hazaras, Turkmens and Arabs have the resolution council know as *Shura-i-islahi* that deals mostly with serious issues. In the council *Shura-i-islahi* Sharia laws play an important basis in the proceeding of conflict resolution.

Arbad: The Arabs have representative system known as *Arbad* who represent on behalf of the village to the government administration. *Arbad* may be appointed by state official or by the community to play a mediatory role between the villager(s) and the government official in solving conflict.

Shura-i-Jammakhama: It is traditional council of *Ismaili Shai* community in Afghanistan. Here the clergies, who are well known to *Ismaili* rule and logic of religion plays a vital role. The Clerics (*Mukhi*) act as the judge and lead the *Shura-i-Jammakhama*. In the larger and serious matter village heads joint the *Mukhis*.

The incapability of formal justice system of Afghan to bring disputes to a just and fair manner people lack confidence in it and they often opted for informal justice system. Still many communities in Afghanistan depend upon the informal justice mechanism to solve their disputes. There is no formal court in many areas where only informal justice mechanism is available. There are some regions in which the primary court even referred to *Jirga* tribunal for some cases.

4.3. Proceeding of Informal Justice System

The procedure of decision-making and dissolving the disputes are also different among the ethnic group and region. The conflicts are brought to justice by the decision tribal council on the principle of their traditional laws. There are also different procedure and types of penalty inflicted to the accused accordant to the verdict of their tribal council.

In the Pushtun dominated areas prevails a practice known as *Machilgha* or *Baramta*. It is of handing the property of equivalent value by the both opponents to the third party for the enforcement of *Jirga* decision (*Tselay*) at the end of the proceeding. If the decision (*Tselay*) of *Jirga* is not abided by any party the *Machilgha* or *Baramta* is given to other party or to the *Jirga* members as a penalty. At the end of the case *Nerkhs* (price) is to be given to the victim by the proprietor for the damages caused in the conflict. The decision of the *Jirga* can be asked for a review by another *Jirga* two times if any party is not satisfied with the decision made by the first and the second *Jirga*. However, the third *Jirga* would be final which also known as *Takhm* and

the party will have to accept and abide by it. If the final third *Jirga* decision is not obeyed, the guilty is fined and the tribe has the authority to even burn down their house. Here *Arbakai* (a group of people who are warriors in times of war and maintainer of the law and order in the peace in ancient times) is responsible for implementation and punish the violator of the decision made by the *Jirga*.

The penalty and sentences for the crime committed are also different among different tribes. The Afghan, especially the Pushtun perpetrator is asked for 'forgiveness' (*Nanawat*) with the material punishment in order to restore peace and friendship thereafter (Drumbl 2004:15). *Nanawati*, the custom of seeking for apology are also done in different ways. In some crimes, the accused family offers slaughtering of sheep to other party. Crimes for murder usually are compensated by giving two fair and virgin girls if the victim's family accepted without revenges. However, in the Nuristan province, girls cannot be given as fine to victim family as it is condemned and banned. Other practice among Pashtun is that the dead bodies are carried to the grave by the relative of the accused and even lied down to the grave dug for the victim surrendering to the victim family as part of begging forgiveness and reconciliation. In eastern *Nuristan*, the murderer and their family are expelled till the conflict is dissolved (ILP Report 2004: 28). In the central *Hazarajat* region, the entire family is punished if a member of the family is accused of theft and asked to promise not to repeat again.

In the case of debt, the debtor is considered as a thief and the *Jirga* fixes another day for the payment of debt if the debtor cannot pay on the appointed day. In the case of *Hazarajat* in the region of central debtors are given "indecent certificate" and declared indigent if he can no longer pay his debt. In this case the indigent may not repay their debt again.

The crimes against women are always considered to be a severe crime and asked for heavy *Khoon* (Poar or Blood Money) (Drumbl 2004:15) including four copies of Holy *Qoran*, four women, and a fat sheep. For Pushtun penalty for kidnapping married women is the same as seven murders. Both man and woman are killed if they are found committing adultery by consent and if it is by force, the man will be punished by cutting off his ear or sexually insulted. If the adulterer is killed for his crime, the killer needs to compensate only half *Poar* of a murder. If the husband injures or kills his wife, his father-in-law can claim *Paor*. If the widow is to marry a person from a different tribe the husband is considered a kidnapper and fined *Poar* on the background that he insults the tribe of the widow. In the case of the people living in the region of central *Hazarajat* hardly talk about the crimes, especially against women in order to avoid insult from the people and the criticism of the religious leaders (Wardak 2004: 34). The *Jirga* of this region prefer compromise and apology between the parties or send the case to the government. The practice of giving girls to the victim family is not common in this region. However in the eastern part of Afghanistan (Nuristan province) region the penalty of crime against women is more serious. Especially in the case fornication if the adulterers are married, husband or even the witnesses of the crime can kill both the adulterers. And if they are unmarried the *Jirga* will ask both the families to marry them.

4.4. Verdict of the Afghan Informal Justice System and Women

The informal justice system is that the customary laws are neither codified nor written, and has no proper structure and procedure of its institution. At the same time "Customary laws are dynamic; they are manipulated, disputed and changed continuously as result of changes in the social system they regulate" (LandInfo: 2011). Its interpretation also varies from region to region and community to community. By its nature provides space and opportunity for the people who have vested interest to intervene in adjudication. The verdict and judgment of

informal justice system does not reach up to the International Human Rights standard in many aspects especially in dealing with crime and issue of women rights.

Since the government of Afghanistan has not efficiently administered especially many districts in the northern regions, informal justice mechanism came under local commander and play important role in the decision making and resolving disputes. The majority districts of the *Faryab* and *Jawzjan* in the northern Afghanistan adjudicate the dispute by local commanders who rule over the region. The Mullahs and elders also play important role though local commander controls the justice system in some of the regions of Afghanistan.

Afghan customary justice system demand for apology and reconciliation comes along compensation, return of stolen good, payment or exchange of women within disputing parties, blood money in case of revenge, etc. The adjudication of informal justice system goes to the extent of permitting blood feud within acceptable limit (Barfield et. al., 2006: 6). It is common in case of murder. It is justified that the victim family is compensated by other party involve in conflict. In the system of *Poar*, two fair virgin girls are given to the victim family by the accused so that the enmity between the conflict families will disappear by sharing blood line through their offspring. In spite of the fact that the informal justice system came into conflict with the Afghan statutory law, principles of natural justice and the state's international legal obligations, people from conservative, illiterate and rural areas prefer the informal justice system.

5. Afghan Formal Justice System

The formal Afghan legal system has been weakly established. There was no ruler who brought the whole Afghanistan under unified or codified single legal system successfully. Several Afghan rulers attempted to bring under unified, independent and modern democratic justice system were failed. J. Alexander Their, senior rule of law adviser of the 'United States Institute of Peace' examined the Post-Taliban era judicial development of Afghanistan and opined that "the Afghanistan judicial system has been historically subordinated by executive branch" and "the state is almost never held responsible for its wrong doing, and the state is considered by its self and its citizen to be above laws" (UNDP Afghanistan Human Development Report, 2007; 73). In spite of the changes of regimes in Afghanistan, it does not affect much of the Afghan legal system until the downfall of Taliban. Afghanistan with the help of international organizations introduced new democratic government with an independent judiciary.

The present Afghan legal system is influenced by the Egyptian and western especially of the French. The Afghanistan new constitution gave judiciary a co-equal branch and became a part of the government as a separate organ headed by the chief justice. The Afghan Supreme Court is responsible for the protection of the citizens' rights, overall administration of judiciary, appointment and impeachment of judges, and to uphold the constitutional laws. Supreme Court is also responsible that the state law is consistent with the Islamic laws in the country since Afghanistan is an Islamic country and majority of the populations are Muslim. There is also provision in the constitution that the area where the present laws do not exist, the *Hanafi* school of *Sharia* laws is to be applied (Wardak 2004: 324).

5.1. Afghan Statutory Laws and Woman Rights

The present Afghan 2004 Constitution there is provision for individual rights that cannot be amended though certain rights can be suspended during the state of emergency. The preamble of the constitution itself affirmed to observe the United Nations Charters and the Universal Declaration of Human Rights. The constitution endorsed to establish law and order base on the

peoples' will and against the oppression, atrocity, discrimination, violence, etc. The constitution ensures the rule of law, social justice, the fundamental rights and freedoms to the entire citizen.

Afghanistan also signed and ratified many international treaties and conventions of socio-political and economic rights. The present Afghanistan Constitution of 2004 in article 7 states also that 'it is the obligation to abide all the United Nations Charters, the Universal Declaration of Human Rights and international treaties which Afghanistan has accepted and signed'. Afghanistan recognised and party to the international treaties and conventions such as CAT (Convention Against Torture), CRC (Convention on the Rights of the Child), Rome Statute, CEDAW (Committee on the Elimination of Discrimination Against Women), ICCPR (International Covenant on Economic Social and Cultural Rights), CERD (Convention on the Elimination of All Forms of Discrimination) and ICESCR (International Covenant on Economic Social and Cultural Rights) (Oates at al., 2004: 51). Afghanistan is also a party to the treaty of Convention on the Political Rights of Women of 1953, International Convention on Economic, Social, and Cultural Rights, International Convention on Civil and Political Rights, member of the International Labour Organization, Convention on Equal Remuneration for Men and Women worker for equal value of 1951, and the Convention concerning Discrimination in Respect of Employment and Occupation of 1958 (Nawabi 2002: 2). Afghanistan accepted to uphold and implement these treaties without any discrimination on any ground.

If we look into the Afghan constitution of 1964 the preamble itself speaks about achieving justice and equality for the people. Many articles of the 1964 constitution of Afghanistan emphasized upon gender equality. Article 25 states that "the people of Afghanistan without any discrimination or preference have equal rights and obligations before laws". Article 26 provides rights and liberty to all citizens without any discrimination based on sex. Likewise, the constitution of 1976 also states in article 27 that "all the people of Afghanistan, both women and men, without discrimination and privilege, have equal rights and obligation before the law." The Afghan Constitution of 1987 and 1990 further states in Article 28 that citizens of the republic of Afghanistan, both men and women, have equal rights and duties before the law, irrespective of their national, racial, linguistic, tribal, educational and social status, religious creed, political conviction, occupation, wealth and residence. Designation of any illegal privilege or discrimination against rights and duties of citizens are forbidden. And the Article 33 states that "all citizens of the republic of Afghanistan are equal and uniform to all citizens". The latest Constitution of 2004 also provides equal legal rights to all citizens. The constitution declares equality of men and women in all aspects. However, it is unfortunate that status of women remains lower and equality of sexes is subordinated to the traditions need of the family and Islamic principles as stated by *Sharia* (Shankar 2004: 59).

5.2. Afghan Formal Judiciary

Afghanistan before the introduction of unified courts by the 1964 constitution, there were two types of legal courts in Afghanistan i.e., the informal Islamic laws court and the formal state laws court (Senier 2006: 1). There were *Sharia* court and state court side by side during 1880s – 1960s where criminal, family, and personal cases were appealed and resolved under judgement according to Islamic laws (*Sharia*) court. On the other hand, the case of commercials, taxes, public servants and other government related cases were solved by state laws court. The significant change brought in Afghanistan judicial system by the 1964 constitution Article 97, declaring the independence of Afghan judiciary, creating a unified hierarchical judicial system and made unified system of law (Their 2004: 6). Theoretically, the constitution made state's law above all other laws in Afghanistan. Thereafter, the *Sharia* laws are excluded from judicial proceeding except when there is no provision in constitution to deal with the case. The state

codified law by the codification drive in the mid-1960s to mid-1970s and the structure of court was introduced by 1967 Afghan constitutional laws with Supreme Court, Central high court of appeal, Provincial court and Primary court (Ibid: 6-7). These features of judicial system remain with the little change in the contemporary judiciary.

Article 97 of the 1964 Constitution made Afghan judiciary independent. The King, Zahir Shah, set up an independent Supreme Court on October 15, 1967 (Sirat 1968: 567) and Bonn agreement further envisaging the continuity of the independent judiciary of 1967 so that Afghanistan judiciary remains independent till date. Afghan judiciary has Supreme Court, Court of Appeal and the Primary Court. There are also specialised courts such as juvenile court, family courts, public security courts, commercial courts, etc. to deal certain cases. The Supreme Court, headed by the chief justice is the highest court and responsible to the organisation and administration of the lower court of Afghanistan. The Afghanistan Supreme Court under chief justice nominates candidate for judicial appointment and determines number of primary courts to the province based on their necessity. The high court of appeal is the next highest court which has the function to hear an appeal against the provincial court. And the Afghan provincial court set up in the province with appellate power against to the lower primary courts decisions. The Supreme Court is in Kabul and the provincial courts and primary courts are in the provinces.

5.3. The Afghan Executive Branch and its Legal Function

The executive of the Afghanistan government has also very important role and part of its justice system which directly and indirectly affect the human rights situation in Afghanistan. Some of the main organs of executive which has legal implication are as follow:

The President: As head of the executive of the state, President also has its role in the Afghan legal system. The President appoints members of Supreme Court, Attorney General, Justice of the Supreme Court, judges etc. The President has power to dismiss them if they are acted against the constitution. The President also receives resignation of staff and judges of the Afghan legal courts. He also has the power to reduce/pardon penalty, endorse laws and judicial decrees. As the president, he suggests laws and reforms to the policymaking body. He also convenes the Loya Jirga and supervises the constitution. His consent and signature is necessary for the bill to become of law.

The Ministry of Justice: The Ministry of Justice is in charge to carry out laws passed in the National Assembly and uphold the rule of law. It also has the responsibility of government's judicial affairs, promoting legal awareness, managing the prisons, detention centres, and juvenile rehabilitation centres of the country. The Ministry of Justice has ten department i.e. Administration (*Umomi-idari*), Government Cases (*Qazawya-dawlat*), Inspections (*Taftish*), Juvenile Justice (*Markawziislah-watebe-ya-i-atfal*), Law Drafting and Review (*Taqnin*), Office of the Minister (*Daftar Muqam*), Political Parties and Social Organisations (*Insijam*), Publications (*Nasharat*), Prisons (*Umomi-mahawbis*) and Rights (*Hoquq*). The entire departments are assigned to each particular work. Among these departments, the Law Drafting and Review (*Taqnin*) division plays a major role. It has the responsibility of drafting laws that are to be considered and passed by the legislature. It reviews laws to ensure it in accordance with the principles of the constitution and the principles of the *Shari'a* before a law is considered by the National Assembly. The other ministries have responsibility and contribute to development and accountable to the justice mechanism of the country.

Afghan Police: The Afghanistan National Police (ANP) under the Ministry of Interior has eight regional commands and many smaller commands in the provinces. Police play major

role as laws enforcing body of the executive. The police are the legal executive branch, which is most closely interacting peoples while performing their duty. Maintaining law and order, detecting and discovering the crime is the main responsibility of the police.

Attorney General's Office (Saranwal): Attorney General's Office (*Saranwal*) is the independent executive agency of Afghan prosecution service. It is responsible for the investigation and filing of cases against the accused in court. It is divided into three units as Civil, National Security and Military, and further sub-divided into six departments. The Deputy Attorney General is placed at the head in each department. The Civil Unit investigates and prosecutes Penal Code cases in the criminal courts. The National Security Unit investigates and prosecutes terrorist cases in the National Security Courts. And the Military Unit investigates and prosecutes the criminal cases against police and other law enforcement officers.

The Defense Attorney: The New Afghan 2004 Constitution Article 31 provides every citizen the right to seek an advocate to defend his case for which he is accused under the law. The constitution also gives the right to inform of the attributed accusation and to be summoned to the court within the limits determined by law, if she or he has been arrested. In the criminal cases, under the constitution the state is to appoint an advocate for a destitute.

The National Assembly: The Afghan National Assembly, the *Wolesi Jirga* and the *Meshrano* are law-making bodies. It has the authority to pass, modify, and abrogate laws of the country. It has the power to amend and alter certain laws of the constitution. The President may ask to reconsider the bill or extend sometime to enact the law but if national assembly passed second time, the president has to sign the bill to become a law. It also has the power to ratify the international treaties and agreements, or abrogation of membership of Afghanistan. The *Wolesi Jirga* has the right to accept or reject the President's appointments of Chief Justice and Judges of Supreme Court. Thus, the National Assembly has roles directly and indirectly in the legal mechanism of the country.

The Central Prisons Department (CPD): The Central Prisons Department (CPD) is also under the Ministry of Justice. It is controlling and maintaining all detention centres and prisons throughout the nation. It is also responsible for transporting inmates to the various courts for trial and hearing. It has inadequate detention centre and prison.

5.4. Women in Afghan Current Judiciary

There were Afghan women working in the judiciary as judges after the Constitution of 1964, since the establishment of an independent judiciary in Afghanistan. Afghan women were in the high positions as the heads of the Juvenile Court, Family Court, and even in the Commercial Courts. They were graduated either from the School of *Sharia* or the School of Law and Political Science. Since, the collapsed of Afghan state judicial by wars, conflicts and subsequent Taliban rule in Afghanistan, women judges and lawyers disappeared from the court. After the downfall of Taliban, few women came back to court especially in the lower courts and courts at the appellate level. President Karzai took up significant steps toward ensuring women rights by appointing many women in the judiciary. In the year 2005 three women were appointed as assistant judges in Supreme Court (Basel 2006).

However, women are under-represented in Afghan judiciary. At the same time most of the Afghan women are illiterate and only women in judiciary mostly are in lower position. Men dominate the key positions in the judiciary. The women judges were not performing the same

function as a male judge does and tend to act as judicial clerks rather than involve in the adjudications of cases According to Amnesty International a number of senior judges expressed a lack of concern and even resistance to the greater inclusion of women in the judiciary and further stated that many senior judges expressed outright opposition to increasing the number of women judges (Amnesty International 2003).

6. The Critical Evaluation of Contemporary Afghan Justice System and Women

The Afghan new democratic has been introduced judicial reforms since Bonn agreement. It has improved in all aspects of the legal system. However there are limitations which still existing in Afghan system especially in dealing with women rights and issues. There are several problems in the Afghan legal system such as lack in infrastructure, properly trained personnel, unclear and existence of multiple laws, Inaccessible to legal documents, corruption among the legal personnel, pressure and intimidation by warlords, warlord, commanders, local authority and other and influential people. Another challenge faced in the contemporary legal system of Afghanistan is the integration of state's formal legal system and informal legal system. In addition to that there is lack in co-ordination and interaction among the judicial personnel. It is also criticised for being not up to the International Human Rights standard in adjudication.

6.1. Integration of State Formal Legal System

The plural legal systems of Afghanistan across the country create confusion. There is no integrated justice system of formal and informal. The integration of State and traditional justice systems are one of the biggest challenges which will not be easily solved. The concept of justice, the procedure of adjudication and penalty to the law breaker are different and contradict especially in the issue of women rights between these systems. At the same time, there is a huge division in the Afghan population in the preference of these two formal and informal justice mechanisms. The large section of the Afghan population prefers the informal legal systems. The alien, slow, bureaucratic, and corrupt nature of state formal justice systems are the main reasons why people specially from rural conservative areas stay away from state legal system. These local people also consider that the Informal justice system is more relevant for the revival of social harmony and reparation. On the other hand, there are large sections of population who prefer the state justice mechanism. The state legal system is new with lots of obstacles but it is showing the sign of improvement in many aspects. The local informal legal system has not change the way women are treated in spite of the offers and suggestions given by the international laws, 2004 constitution, Sharia, and various provision of the criminal Statutes. The women rights are deprived and the judgments given by them in disputes remain abusive to women. Despite these entire problems, there are also large sections mainly from urban and more liberals who prefer state legal system.

In such a situation, bringing together both the legal systems is a huge task. Several methods have been introduced for the integration of both the systems. The existing plural legal system creates not only chaos to the people in choosing but also obstacles to peace and societal harmony of Afghanistan. There is a need for an alternative system that can accommodate both the systems and reforming the local legal system especially in dealing with the spheres of women.

6.2. Legal Position of Woman in Afghan State Law

The constitution of Afghanistan provides woman equal status with man since the introduction of 1964 Constitution. Further by the reformation of civil code in 1977 there were changes in the status of women. The reform repealed marriage law of 1960 and introduced legal marriageable ages as 15 years old for girl. It also permits women to choose their husband without prior consent

form their parent with was not legalized initially. The civil code of 1977 also regulated polygamy under which husband has be proved himself to give justice to all wives and concrete reason(s) why he has to marry another woman. The acceptable reasons could be barren, incurable sickness and other serious matters. The constitution also provides woman right to file for divorce if her husband on any circumstance marries a second wife; if her husband has incurable disease; if he is not with her without valid reason for more than three years; if he cannot maintain the necessity as a husband and file for divorce in five years if he is in prison for 10 years or so.

However, in spite of these legal rights the status of women does not change. Women rights to divorce are more restricted comparatively with men who have extra-judicial rights to divorce his wife (Lau 2002: 25). The family laws in Afghanistan are still under the shadow of un-reformed *Hanafi* family law and customary law. Though the 1977 civil law introduced family court, it has not been practiced. Many women do not even know that they have rights envisaged in the constitution. Those women who know their rights are inaccessible to the concern courts and lawyers without the assistance of male relatives.

6.3. The Lack of infrastructure and Facilities in the Afghan Legal System

Due to decades of unending wars and conflicts Afghan legal records, documents, infrastructures and other facilities has been destroyed. The Afghan state is in the process of nation building and the overall development including legal system is in a slow pace.

Lack of Qualified Legal Personnel: The judges were appointed by the president on the recommendation of the Chief Justice of Afghanistan. The judge should have a degree in the faculty of law or in the faculty of *Shura* as a qualification with one year legal professional training. The age of the judge is between 28 to 60 years of age. There were situations where many judges who have not attained the needed qualification and are not within the age limit for the appointment of a judge. Besides, there were influences of political party and armed group in the appointment of the judges (Amnesty International Annual Report 2003).

Under the Afghan judicial reform, judges have received training from international agencies and support of the international Community to the legal and academic communities of Afghanistan gave the new hope for Afghan legal system. In spite the training and supported given by the international actors in Afghanistan, Afghan police are still underdeveloped in their skill and man power. Afghanistan has just 2,000 prosecutors and 250 lawyers are licensed to practice in court registered with the Attorney Registrars Office till the month of May 2007. Due to the lack of legal research materials, laws, and published opinions have to depend on outdated old laws or laws of other country (Nojumi 2004:13) which some time are of no relevance in the present condition.

Afghanistan also does not have defence attorney in many parts of country. The Legal Aid Department of the Supreme Court administers the only state sponsored Criminal Defense Office (Benard, et al. 2008: 49). The only defence bar they have is very small and represents very few people. Currently, non-state legal aid providers International Legal Foundation, the Legal Aid Organisation of Afghanistan, *Da Qanon Gashtunkay*, and *Medica Mondial* act as criminal defence. However, they have limited resources with many obstacles to represent all criminal defendants.

Women were under-represented and are not in important positions in Afghan judicial system. Even the appointed women judges were under the domination of male judges and were not in the sole adjudication of cases. There is a lack of concern about the women under-

representation and also the obstacles to increase the number woman judge Afghan judiciary system itself.

Lack of Infrastructure: There are still many provinces and districts without enough primary courts in Afghanistan. The specialised courts established by the Afghan laws have not been established outside Kabul. As reported by the Amnesty International in 2003, there are no proper premises, facilities, no basic stationary for proper functioning in many Afghanistan courts.

There is no proper sanitation and maintenance in the present detention centres and prisons. There is a plan to have detention centre in each administrative districts and prison in each provinces. However, as of now, there are only 120 districts having detention centre. The objective to have detention centre the entire district has to go long distance (Benard, et al. 2008: 49). There is no proper rehabilitation programme or prison for the prisoners. Though the 2001 Bonn Agreement authorised the interim government to establish independent human rights commission to monitor human rights, investigation of violation of human rights, and development of domestic human rights institutions, it is still far from reality. Medical and Psychological treatment is require for the women victim of crime which are not properly established and maintained. Thus women suicide is common in Afghanistan after they were accused or victimized.

Limitation of Executive Role in Justice System: In spite of formations of institutions, ministry and other law enforcing organs in the Afghan government, the justice system is far behind to produce credible justice in the country. The Afghan government has also introduced many reforms. They have separate ministry of justice and several departments to deal with justice related problems and issues. They also set up human rights commission and Attorney General's office to investigate the cases etc. However, governmental organ engaging in justice system has no much authority and resources required to perform its work since its formation. National Assembly has enumerable important issues to deal with which made them unable to give sufficient effort to give to justice system.

Afghan police are still underdeveloped in their skill and man power in spite of the training and supported given by the international actors in Afghanistan. In many occasions, the lawbreakers are escape unpunished by bribing the police officer. There are places especially in rural areas where warlords and armed groups over-power the police (Nojumi 2004: 29). Thus, some time women victim of crime especially rape case fear to go to the police or court for by unavoidable and unwanted consequences and by the fear of accusing unlawful sexual activity to the victim (AI Annual Report 2003: 5). Crimes against women in the family are often ignored by police and the court by considering as a private affair. There is no provision that clearly criminalises violence in private sphere in the criminal code of Afghanistan (AI Annual Report 2003: 5). Corruption and intermediation are also in the Afghan police. In many occasions, the lawbreakers are escape unpunished by bribing the police officer. In some rural areas, warlord and armed groups over-power the police (Nojumi 2004: 29).

Influence of Traditional and Islamic laws: The inaccessible applicable statutes and legal materials related to secular laws they depend on Islamic law and customary laws. At the same time, there is a growing tendency among Islamic groups and political party inclined to religious issue for quest of power and legitimacy which in turn degrade the state legal system. Even after the unified court was introduced in Afghanistan, the traditional religious and tribal court is still popular in the rural and conservative families.

There are many occasions and cases where people were ignore state laws by the custom and religious practices. The crime of forced marriage of girls and women can be noted as such example. They often go unprosecuted though Afghan national law states it as a crime. The society, judges and even prosecutors do not normally take it as a crime. Hence, the practice of forced marriage is a common phenomenon.

Influence of External Actors: Constitutionally Afghanistan Judiciary is an independent institution since the 1964 Constitution. It's provided in article 97 that the Afghan judiciary independent. The King Zahir Shah set up an independent Supreme Court on October 15, 1967 (Sirat 1968: 567) and Bonn agreement further envisaged the continuity of the independent judiciary of 1967 so that Afghanistan judiciary remains independent. However the Post-Taliban government of Afghanistan undergoing through problems of control and administration in many fields, including legal system in certain areas where there are stronghold of warlords and commanders outside Kabul. The judicial officials and their proceedings are under the influence of the certain people who have power to intimidate or to threaten them or any other measures that directly and indirectly affects the state judicial system. Afghan judiciary is influenced by public officials, prominent figures, armed groups, commanders etc. The Afghan justice system is not still free from evil of bribery and corruption. During the appointment of the judges and legal staffs till the adjudication and giving verdict were influences by the external actors. J. Alexander Their states that the unpleasant situation of the Afghanistan court system under the leadership of the Fazel Hady Shinwari and an ally Abdur Rassool Sayyaf. He states that the court of Afghanistan under the guidance of the Fazel Hady Shinwari who led the Afghan court systems appointed the numbers of the non-university trained Muslim clerics to all levels of the court system and accede the number of judge in supreme courts over limit of the Afghan constitution. He further states that the *Fatwa* council was created to issue extra-judicial proclamations and the lower registers of the court system were declared outside control of the Supreme Court (Their 2004: 7). At the same time the international actors and Afghanistan government are not sincere and unconcerned in building efficient legal system. The presence of many political and military high ranking officials who were accused of human rights violation and war crimes in the government of Afghanistan (Wardak 2004: 331) worsen the condition legal system in Afghanistan.

6.4. Afghan Informal Justice and Women Rights.

The main principles of Afghan customary laws are justice, hospitality, love, forgiveness, self-respect, tolerance, revenge etc. and also communal harmony. These principles are strictly followed by individual who return received honour, support, identity and protection from the community. While following these principles some time ignore the rights of women and girls. There are limitations for women to approach in state legal system by lack knowledge of rights, inaccessible to justice by social restriction for trial. At the same time formal justice system has not been in not in proper shape. In spite of the fact that sometime the informal justice adjudication resulted human rights abuses, majority of the people use *Shura* and *Jirga* mechanisms to redress their disputes.

The *Jirgas and Shuras* dealt with all sort of disputes extending from minor to major cases like murder. In informal justice, especially in *Shuras* are male-dominated and has very limited venue for women to address their issues (Common Country Assessment 2004: 65). Women and children are not allowed to join and participate in the local *Shura* and *Jirga*. If women have access informal justice system she needs male relative to accompany and assist her. It has no regulated procedure of adjudication and there are risk of violation of fair trial and human right of international standard. Without systematic monitoring regulation, the *Jirga* and *Shura* sometimes

go against international concepts of human rights. Many time women crimes are undermined considering it as private and family affairs. There are a number of cases were women and girls are being subjected to serious human rights abuses as a result of informal justice mechanisms. United Nation reports (2003) states that women and girls are subjected to human rights abuses as a result of informal judicial mechanism (*jirga*) adjudication with the application of tribal law and traditional norms.

In the name of restoring communal harmony traditional justice system gave verdict undermining women and girls rights. Sometime a serious conflicts are resolved by giving two young girls to the victim family to negotiate and bring the harmony that damage caused by the conflict between them. The girls compensated to the victim were usually young girl. The future of the girl is dependent on the victim's family. They may forcefully marry her or work for the victim family without her consent. Women were also sometime face injustice in dealing with the matters of inheritance, marriage, and property (AI Annual Report 2003: 5).

The practice of the *Poar* (blood money) system can be noted here as one of the examples of negative aspects of the Afghan informal justice system. It is common in case of murder thought it is justified that victim family is compensated by other party involve in conflict. In the system of *Poar* two fair virgin girls are given to the victim family by the accused so that the enmity between the conflict families will disappear by sharing blood line in their offspring. In spite of the fact that the informal justice system came into conflict with the Afghan statutory law, principles of natural justice and the state's international legal obligations, people from conservative, illiterate and rural areas prefer the informal justice system.

6.5. Afghan Justice System and the Women Rights Protection

The absence of rights to fair trial, rights of defence, widespread arbitrary detention and discrimination of the women by both traditional and state justice system are other major causes of concern in Afghanistan. There is no free access to the justice system to put forward their grievances and defend their rights. It is unfortunate that for many girls and women in Afghanistan, their grievances often go unheard and they are not able to bring them to justice. If women and girls want to go to police or court and prosecutor, male relative have to assist and accompany or approach on their behalf. Especially rape victims fear to go to the police or court for they know the unavoidable and unwanted consequences. The victim of rape case has to undergo virginity test for the witness to be presented in the court as there is no forensic investigations facility. There is even a chance that they will be accused of unlawful sexual activity. The other peculiar practice in the Afghan family is insisting the court to detain if the individual go against the will of the family. These cases are common if girl is not agreeing to marry according to their family wishes. Afghan Women had also bitter experience during the rule of Taliban. Their legal rights were taken away for a long period of time. The impact of Taliban rule still remains in many parts of Afghanistan.

In spite of the ratification of CEDAW, there are discriminations against women even in the Afghan criminal justice system. There is no free access for women in Afghan justice system and few prosecutions for crimes against a woman. A woman has to be assisted by a male relative if she wants to approach to the police or to the court. Women who are victims of violence, forced marriage, rape, etc., in the family have to bear more burdens for there is no one to assist them to the court or police and the fear of the unwanted consequences.

Crime within a family: In Afghanistan, violence against women in the family is a serious case which the criminal does not usually accept as a crime. Afghans, till today, have the tendency that

the problems in the family are the private affair which does not draw the attention to the state justice system. Sometime the police and the court do not accept complaints of women regarding the family related crime. Even in serious cases of violence in the family, police and court often suggest going to the local customary law court or asked to return home to their husband for reconciliation (Amnesty International 2003). The victims of violence in the family often asked women for reconciliation with their husband. In the case of divorce proceeding, violence in the family is not accepted as reasonable ground.

Another controversial case in Afghanistan is rape case: Like family violence, rape cases prosecution is taken very rare in the criminal justice system. Here, the main reason was that, there are no proper facilities and capacity within the criminal investigation department to investigate rape cases. Neither forensic investigations nor alternative facilities to collect the evidence of rape cases are available in Afghan criminal justice system. Virginty test and witness statement are used as the evidences for rape. They have to go through traditional virginty test which is another burden of humiliation and not easy for the investigator. There are cases where rape victim were counter charged for unlawful sexual activities rather than punishing the accused. Thus, Amnesty International (2003) stated that many Afghan women commit suicide to escape from such continuous humiliation.

Forced marriage and underage marriage is a crime under the Afghan national law . However, these cases are often unheeded as a crime by the attitude of people and society. Women and girls running away from home, escaping from forced marriage, violence, and other problems in the family are considered as prosecutable. Woman or girl running away from home often considered as crime of adultery (Zina) and they are prosecuted charging them as adulterer (Jones 2007). The prosecutions of girls and women for adultery are widespread. Those women who commit a crime of Zina (adultery) are forcefully undergoing virginty test. Again, the women who are accused Zina have to undergo a series of humiliation in the time of indicating the evidence and even during the presentation in the court. The lack of gender sensitivity among the police and judicial officials further humiliate women victims.

Conclusion

For almost three decades, Afghanistan has suffered extraordinary devastation, allowing the political authority to rest once at the hands of ethnic armed groups that have accustomed to acting with almost complete impunity because of persistent conflicts. Rights and equality can be ensured only if there are proper laws and order in the state. A strong justice system for the perilous state of Afghanistan is foremost and urgent need of the day and it is important that there is development of state's justice system in the present situation. Although, there has been a considerable improvement in the condition of women in every sphere in the post-Taliban Afghanistan era, the position of Afghan women in terms of legal rights are still lacking behind. Women legal rights were taken away during the rule of Taliban for a long period of time and the impact of Taliban rule still remains in many parts of Afghanistan.

The Afghan contemporary judiciary is lack of infrastructure and trained personnel. It has also unclear and multiple law courts with the pressure from warlords, commanders and local authority. In addition, there are lack of co-ordination and interaction among the judicial personnel. There is also the need for proper rehabilitation programme in prisons and for the prisoners. These improvements will do away the archaic informal justice mechanism based on the customary and religious laws. *Jirga* and *Shura* of the justice informal mechanism have negative consequences. As such, there is a need to regulate the procedures which will result in chances in the informal justice system to adjudicate the cases in a proper and just manner, and

free from external forces. The weakness of the government is often blamed for the resort to traditional informal system in Afghanistan. This being the case, it is unfortunate that for many girls and women in Afghanistan, their grievances often go unheard and they are not able to bring them to justice. Crimes against women in the family are still ignored by police and the court.

In spite of the presence of an independent Afghan judiciary, there are still many provinces and districts without enough primary courts in Afghanistan especially in the rural areas. The specialised courts established by the Afghan laws have not been established outside Kabul. There are no proper premises and facilities, no basic stationery for proper functioning in many of the Afghanistan courts. There is often a situation where there are many judges who have not attained the needed qualification and are not within the age limit for the appointment of a judge. These led women to be affected the most as the political processes and planning for reconstruction, and have not delivered real gains for the women. The laws of male domination are evident in the Afghanistan political process. Apart from the lack of qualified judges and other justice personnel, there is fragmentation with little interaction among judiciary, the police, the prosecutors and the prison service. It is still seen that the Afghan justice system remains an elitist, corrupt and involves long delays in delivering their duties. Thus, people especially from the rural areas prefer informal customary justice system. The unfortunate thing is that the women do not get fair treatment in the informal legal system.

In the New '2004 constitution' of Afghanistan article 2 declared itself as an Islamic state and further declared that the provision of adherence to the sacred religion Islam cannot be amended. This being the case, it would be an opportunity for religious fundamentalist to further suppress women in the name of Islam if necessary measures are not initiated. The present government in Afghanistan needs to improve upon its control and administration of the legal system to further advance the people and the country. The state legal system needs to be incorporated in other parts of the country with active government participation without leaning to the pressures of warlords, commanders or tribal chiefs to give effective legal coverage to the people, especially women. Besides, the people need to be made aware of the necessity and importance of the effective state's formal legal system to avoid them from resorting to the traditional informal mechanisms of dispute settlement. This will prevent people, especially women, from unfair trials. Abiding by the agreements and conventions of the international legal system will also enhance the status of Afghan women in the long run. This step is necessary to receive the support of other nations, as the present government of Afghanistan alone will not be able to effectively build the nation without external supports.

Reference:

1. Afghan Women's Summit (2001), "Afghan Women's Summit for Democracy", [Online: Web], Accessed on 14 March 2007, Ulf: http://www.un.org/womenwatch/afghanistan/documents/Brussels_Proclamation.pdf.
2. *Amnesty International, (2003), "Afghanistan Re-establishing the Rule of Law", *AI Annual Reports 2003*, IA Index: ASA 11/021/2003, [Online: Web] Accessed on 24 September 2007. ULF:<http://www.amnesty.org/en/library/asset/ASA11/021/203/en/10ae4f88-d6b0-11dd-ab95-a13b602c0642/asa110121003en.html>.
3. Barfield, Thomas (2003), "Afghan Customary Laws and Its Relationship to Formal Judicial Institutions," *United Institute for Peace*, Washing ton DC. [Online: Web], Accessed on 12 August 2012, URL:<http://www.usip.org/files/file/barfeild2.pdf>.

4. Barfield, Thomas et. al. (2006), "The Clash of Two Goods; State and Non-State Dispute Resolution in Afghanistan", *The International Legal Foundation*, [Online: web], Accessed on 29 April 2008, URL:http://fletcher.tufts.edu/al_nakhlah/archives/spring2006/senier.pdf.
5. Basel, Marzia(2006), "Judging in Countries in Conflict or Transition: An Afghan Perspective", *International Association of Women Judges*, [Online: Web], Accessed on 23 Dec. 2007, ULF: <http://74.125.153.132/search?q=cache:YTzEdZCQ0o4J:www.iawj.org/w hat/Session1-Basel.doc+Jud+ging+in+Countries+in+Conflict+ or+Tra nsition>.
6. Etling, Bruce (2004), "Legal Authorities in the Afghan Legal System (1964-1979)" [Online: Web], Accessed on 8 February 2007, ULF: <http://www.law.harvard.edu/programs/ilsp/research/etling.pdf>.
7. *IDLO (2008), "Idol Italian-funded Projects (2005–2008) for Legal and Judicial Reform in Afghanistan", *International Development Law organization Evaluation Reports 2008*, [Online: Web], Accessed on 28 September 2008, ULF: <http://www.alnap.org/pool/files/erd-3644-full.pdf>.
8. *International Legal Foundation (2003), "The Customary laws of Afghanistan", *ILF Reports 2004*, [Online: Web], Accessed on 2 July 2007, ULF: International Legal Foundation, http://www.theilf.org/reports/ILF_Customary_Laws_of_Afghanistan.Pdf.
9. Jones, Ann (2007), "Not the Same as Being Equal: Women in Afghanistan" [Online: Web], Accessed on 12 Oct. 2008, ULF: <http://www.tomdispatch.com/post/163092>.
10. Kaka, Palate (2005), "Tribal law of Pashtunwali and Women's Legislative Authority", [Online: web], Accessed on 2 Oct. 3008, URL: <http://www.law.harvard.u/programs/ilsp/research/kakar.pdf>.
11. LandInfo Reports (2011), "Afghanistan: Blood Feuds, Traditional Law (Pashtunwali) and Traditional Conflict Resolution" LandInfo, *Country of Origin Information Centre*, Storgat a: Norway
12. Lau, Martin (2002), "Afghanistan's Legal System and its Compatibility with International Human Rights Standards", *International Commission of Jurists*, Final Reports, [Online: web], Accessed on 24 Sept. 2008, URL: <http://www.icj.Org/IMG/pdf/doc-51.pdf>.
13. _____ (2003), "Islamic Law and the Afghan Legal System", International Commission of Jurists, [Online: web], Accessed August 2008. URL: www.Bglatzer.de/arg/arp/lau.pdf.
14. Oates, Lauryn and Helal, Isabelle Solon (2004), "At the Cross-Roads of Conflict and Democracy: Women and Afghanistan's Constitutional Loya Jirga", *Rights and *Democracy Reports*: Montreal. [Online: web], Accessed on 12 November 2006, URL: <http://dsp-psd.pwgsc.gc.ca/Collection/E84-14-2004E.pdf>.
15. Marsden, Peter (2002), *The Taliban War and Religion in Afghanistan*, New York: Zeb Book.
16. Moghadam, Valentine M. (2002), "Patriarchy, the Taliban, and Politic of Public Space in Afghanistan", *Women Studies International Forum*, Vol. 25, no. 1, pp. 19-31.

17. Nojumi, Neamat (2004), "Afghanistan's Systems of Justice: Formal, Traditional, and Customary", Feinstein International Famine Center, [Online: Web], Accessed on 21 January 2007, ULF: <http://crdc.gmu.edu/neamat1.pdf>.
18. Nawabi, Mariam A. (2002), "Women's Rights in New Constitution of Afghanistan", [Online-Web], Accessed on 8 April 2008. ULF:<http://www.cic.nyu.edu/peacebuilding/oldpdfs/E22Womens%20RightsFullVersionNawabi.pdf>.
19. Nawabi, Mariam A. (2004), "Plenary: Basics of Islamic Law", *The Association of American Laws School*, [Online-Web], Accessed on 27 October 2008, <http://www.aals.org/am2004/islamiclaw/islamicmaterials.pdf>.
20. Schneider, Irene (2007), "Recent Developments in Afghan Family Law: Research Aspects", *ASIEN*, 104, July, pp. 106-118, [Online-Web], Accessed on 24 March 2007, URL:http://www.asienkunde.de/articles/A104_106_118.pdf.
21. Senior, Amy (2006), "Rebuilding the Judicial Sector in Afghanistan: The Role of Customary Law", *AlNakhlah*, spring, [Online-Web], Accessed on 16 Nov. 2007, ULF: http://fletcher.tufts.edu/al_nakhlah/archives/spring2006/senier.pdf.
22. Shankar, Uma (2004), "Problem and Prospects of the Constitutional Government in Afghanistan", *Himalayan and Central Asian Studies*, Vol. 8, no. 2-3, pp. 34-73.
23. Sirat, S. (1968), "The Modern Legal System of Afghanistan", *The American Journal of Comparative Law*, Vol. 16, No. 4, Autumn, pp. 563-569.
24. *The International Legal Foundation Report (2004), "The Customary laws of Afghanistan", *International Legal Foundation*, Accessed on 18 April 2007, and URL: http://www.theilf.org/reports/ILF_Customary_Laws_of_Afghanistan.pdf.
25. Their, J. Alexander (2004), *Re-establishing the Judicial System in Afghanistan*, CDDRL Working Paper, No.19, and Stanford: Stanford Institute for International Studies.
26. *UN Reports (2003) "Situation of Women and Girls in Afghanistan", A/58/421, [Online: Web] Accessed on 22 January 2006, ULF: [http://www.unhcr.ch/huridocda/huridoca.nsf/04d099bc67f0526edc1256dd700503b65/\\$FILE/N0355646.pdf](http://www.unhcr.ch/huridocda/huridoca.nsf/04d099bc67f0526edc1256dd700503b65/$FILE/N0355646.pdf).
27. *Afghanistan Human Development Reports 2007*, "Bridging Modernity and Tradition: Rule of law and the search for justice", UNDP, Islamabad: Army Press.
28. Usha, K. B. (2004), *A Wounded Afghanistan; Communism, Fundamentalism, and Democracy*, Haryana: Shubhi Publication.
29. Wardak, Ali (2003), "*Jirga—A Traditional Mechanism of Conflict Resolution in Afghanistan*", UK: University of Glamorgan Accessed on 22 January 2007. URL: <http://www.unpan1.un.org>.
30. Wardak, Ali (2004), *Crime, Law & Social Change*, Netherland: Kluwer Academic Publishers.

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