



Strengthening Displaced Women's Housing, Land and Property Rights in Afghanistan



NORWEGIAN
REFUGEE COUNCIL



Authors: Jelena Madzarevic and Shobha Rao

Researched by: Samuel Hall (www.samuelhall.org) and Norwegian Refugee Council (www.nrc.no)

Editing by: Hannah Rought Brooks

Photographs by: Laura Cunial, Christian Jepsen, Farzana Wahidi, Danielle Moylan and Sune Rasmussen

Design and layout: Christopher Herwig

Copyright © 2014 Norwegian Refugee Council (NRC)

All rights reserved. No part of this publication may be reproduced, modified, stored in a retrieval system or transmitted, in any form or by any means, without prior written permission from NRC.

The **Norwegian Refugee Council** (www.nrc.no) is an independent, international, humanitarian non-governmental organisation which provides assistance, protection and contributes to durable solutions for refugees and internally displaced people worldwide.

This initiative has been funded by the UK Government and the Norwegian Ministry of Foreign Affairs. The views expressed do not necessarily reflect the UK Government's official policies or those of the Norwegian Ministry of Foreign Affairs. The research undertaken in Afghanistan was also funded by the European Commission, DANIDA, UNHCR and NORAD.

Recommended Citation: Norwegian Refugee Council (NRC), Strengthening Displaced Women's Housing, Land and Property Rights in Afghanistan (November 2014).



Strengthening Displaced Women's Housing, Land and Property Rights in Afghanistan

ACKNOWLEDGEMENTS

NRC would like to express its appreciation to researchers from Samuel Hall Consulting for undertaking the research – specifically, Mss Nassim Majidi, Camille Hennion, Saagarika Dadu and Shahla Naimi.

The study has been founded on the knowledge and expertise of NRC's ICLA programme staff who have shared their insights on their daily challenges and the work they do to ensure that displaced women's access to housing, land and property (HLP) rights become a reality in the Afghan provinces they work in. In particular, our gratitude is extended to ICLA staff in NRC's Kabul and Maimana offices for all their hard work on this report.

We are grateful for the contributions of our key informants from: the Afghan authorities (Afghanistan Land Authority – *Arazi*; Ministry of Refugees and Repatriation – MoRR; Ministry of Justice – MoJ; Ministry of Women's Affairs – MoWA; Ministry of Hajj and Religious Affairs – MoHRA; and the Independent Directorate of Local Governance – IDLG); UN agencies; donors; international and national NGOs; and civil society.

Our special thanks go to colleagues from NRC Oslo – Kirstie Farmer, Gabriela Flores and Monica Sanchez Bermudez – for guidance in streamlining the study with NRC's initiative on displaced women's HLP rights (www.womenshlp.nrc.no) and its further promotion.

Finally, NRC would like to salute the brave refugee-returnee and IDP women of Afghanistan who struggle against innumerable odds in order to survive in an environment where women's HLP rights are relegated to the background. The courage and persistence of these women gives NRC the impetus to continue to support them in creating a new reality of their rights being fully respected, protected and further promoted.



NORWEGIAN
REFUGEE COUNCIL

TABLE OF CONTENTS

FOREWORD	7
EXECUTIVE SUMMARY	8
ACRONYMS AND GLOSSARY	13
1.0 INTRODUCTION	16
1.1 BACKGROUND	17
1.2 NRC's ICLA PROGRAMME IN AFGHANISTAN	17
1.3 OBJECTIVES OF THE RESEARCH	18
1.4 RESEARCH QUESTIONS	19
1.5 RESEARCH METHODOLOGY	19
2.0 CONTEXT	21
2.1 BACKGROUND	22
2.2 DISPLACEMENT	23
2.3 SPECIFIC VULNERABILITY	24
2.4 HLP CIRCUMSTANCES	26
<i>Land grabbing</i>	
<i>Physical access</i>	
<i>Documentation</i>	
<i>Traditional protection</i>	
<i>Economic stability</i>	
3.0 DISPUTE RESOLUTION MECHANISMS	29
3.1 OVERVIEW: COMPETING JUSTICE SECTORS	30
3.2 STATUTORY JUSTICE	31
3.3 TRADITIONAL JUSTICE	34
4.0 LEGAL FRAMEWORKS	36
4.1 OVERVIEW: RELATIONS AND HIERARCHY	37
4.2 INTERNATIONAL HUMAN RIGHTS LAW	40
<i>1948 Universal Declaration of Human Rights (UDHR)</i>	
<i>1966 International Covenant on Economic, Social and Cultural Rights (ICESCR)</i>	
<i>1966 International Covenant on Civil and Political Rights (ICCPR)</i>	
<i>1979 Convention on the Elimination of Discrimination Against Women (CEDAW)</i>	
<i>2000 UN Millennium Declaration</i>	
<i>Islamic human rights law</i>	
4.3 NATIONAL LAW	43
<i>Inheritance</i>	
<i>Mahr</i>	

5.0	REALITIES FROM THE GROUND	54
5.1	OVERVIEW: CASE PROFILE	55
5.2	ECONOMIC ASPECTS <i>Lack of financial independence</i> <i>Example 1: Destitute widow with children street-beggars deprived of land and livelihood</i> Submission to interests of others Costs as a barrier to justice <i>Examples 2 & 3: Request to transfer case to accessible court – a success and a failure</i>	56
5.3	SOCIO-CULTURAL ASPECTS <i>Social stigma</i> <i>Compromises on inheritance settlements</i> <i>Manipulations over mahr</i> <i>Example 4: Mahr waived for peace and protection</i> <i>Lack of awareness of rights</i> <i>Example 5: Changed perceptions on women's inheritance rights – from ignorance to acceptance</i> <i>Restricted movement</i> <i>Example 6: Giving up mahr to retain custody of a child</i> <i>Cultural bias in the justice sectors</i>	60
5.4	INSTITUTIONAL ASPECTS <i>Lack of documentation</i> <i>Lack of access to legal aid</i> <i>Failure to implement decisions</i> <i>Tolerance of coercion and violence</i> <i>Examples 7 & 8: Severe violence resulting from inheritance and mahr claims</i>	67
6.0	STAKEHOLDER INTERVENTIONS	74
6.1	OVERVIEW: FOCUS IMBALANCE	75
6.2	STAKEHOLDER IDENTIFICATION <i>Governmental actors</i> <i>NGOs and civil society</i> <i>International governmental aid agencies</i> <i>UN Agencies</i>	77
6.3	PROGRAMMING GAPS AND CHALLENGES <i>Functional (legal aid) coverage</i> <i>Geographical coverage</i> <i>Selective emphasis on violence against women</i> <i>Monitoring and evaluation</i> <i>Coordination</i>	83
7.0	CONCLUSION AND RECOMMENDATIONS	87
	RECOMMENDATIONS <i>To the Afghan Government – Ministry of Justice</i> <i>To humanitarian and development actors</i>	89
	BIBLIOGRAPHY	91

FOREWORD

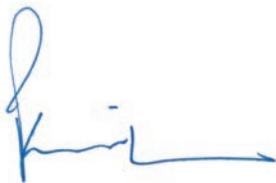
This report captures the Norwegian Refugee Council's (NRC) ground-breaking work in Afghanistan, including NRC's role in bringing greater understanding and visibility to Afghan women's housing, land and property (WHLP) issues in a displacement context. Over three million Afghan women have been internally displaced or sought refuge in neighbouring countries. Regaining or accessing housing, land and property is one of the most important steps towards achieving a durable solution.

Women's housing, land and property rights are recognised in Afghanistan's constitution and its civil code, as well as in Shari'a. However in reality women continue to face discriminatory cultural norms and customary practices. This report aims to highlight such customs and cultural practices and demonstrate the challenges women face to fully realise their rights enshrined in law. It also provides recommendations to the Government of Afghanistan, donors, humanitarian actors and civil society organisations on how to tackle these challenges and increase meaningful engagement on women's HLP issues.

NRC Afghanistan is proud to be a leading organisation working on and bringing attention to women's HLP issues. This report is based on experiences directly from the field. It captures the bravery of our clients, who are increasingly seeking recognition of their rights and challenging deep-rooted customs which constitute roadblocks to Afghan women achieving their rights.

We express our special thanks to NRC staff, Samuel Hall, and all other players who have been involved in this project and in this research. We would like to thank our donors who generously fund our women's housing, land and property rights programme in Afghanistan and for funding this report. We also thank the Government of Afghanistan for giving us the opportunity to work on this challenging issue. And most of all, we extend our gratitude to NRC Afghanistan's clients who have shared their stories through this report.

Thank you,



Prasant Naik

Country Director

Norwegian Refugee Council, Kabul, Afghanistan





EXECUTIVE SUMMARY

Legal security of tenure is one of the key elements of the right to adequate housing. For many Afghan women, security of tenure is only achieved through their relationship with men – their fathers, husbands, brothers or sons. Inheritance and dower (*mahr*) represent two of the main opportunities for women to acquire ownership of land and housing and achieve security of tenure. Within *Shari'ah* women are entitled to different inheritance portions depending on the circumstances. At the end of their relationships with men through either death or divorce, women become vulnerable to losing their possessions and security against the competing interests of dominant family members.

The scarcity of arable land in Afghanistan renders it extremely valuable and essential for economic and political power. Ownership of such land is therefore crucial for the empowerment of women, but social and cultural attitudes and traditions in Afghan's patriarchal society often mean that women are precluded from accessing such land.

The objective of the report is to summarise trends from NRC's legal case analysis and identify the challenges faced by displaced women in accessing their housing, land and property (HLP) rights. The report focuses on inheritance and *mahr* as two key sources of women's independent access to HLP in Afghanistan. Based on the findings, the report also introduces recommendations aimed at policy, legislative, institutional and related improvements, as well as new programmatic approaches for NRC, partner agencies and other stakeholders focused on strengthening women's access to HLP, in the context of displaced women's specific capacities and vulnerabilities.

This research offers evidence and guidance for policymakers and NRC to help eliminate the roots – not just outcomes – of gender inequality. It does this by providing: a contextual overview of the displacement impact on addressing women's HLP issues in post-conflict Afghanistan; an overview of the essential characteristics and relational complexities of the statutory and traditional justice sectors; a review of the applicable international and national legal frameworks governing women's HLP rights in Afghanistan, with specific focus on inheritance and *mahr*: the identification of "ground realities", i.e. the economic, socio-cultural and institutional obstacles in resolving HLP disputes and their impact on women's enjoyment of HLP rights; a brief assessment of stakeholders' intervention capacities to address identified challenges; and recommendations for addressing the observed obstacles, improving legal and institutional framework and addressing programmatic gaps.

The report is based on secondary and primary sources. External research consultants conducted a review of relevant and reliable literature. Primary sources were gathered through beneficiaries, relevant stakeholders and the NRC's in-country legal teams located in six offices in Afghanistan, covering the provinces of Balkh, Faryab, Herat, Kabul, Kunduz and Nangarhar with outreach to adjacent provinces. A strong qualitative approach was assumed. The report is based on the ICLA programme database, selected legal case studies, key informant interviews and desk research.

Inheritance is the property one receives upon the death of a relative under the laws of descent and distribution, in the absence of a will.

Mahr is the property or a sum of money which a Muslim wife is entitled to get from her husband when entering into marriage, as a token of respect. It is the wife's right guaranteed by *Shari'ah* and Afghan national law and stipulated in the marriage contract. Received unconditionally, *mahr* represents a woman's personal property.

The report finds that, within the parameters of women's general HLP rights, there are striking differences between the law and the realities on the ground. While the applicable legal framework and Islamic jurisprudence provide no significant formal barriers, serious deficiencies of both the statutory and customary justice systems in their application of the rules often result in women being deprived of a range of their rights. The traditional justice system suffers from, among other things: a lack of educated/trained decision-makers and lawyers; extremely discriminatory interpretations of applicable laws and norms; the prohibition of women's active participation; and a high susceptibility to local power-holders. The statutory justice system seems similarly inadequate due to, *inter alia*: a weak presence throughout the country; a lack of trained judges and lawyers; corruption; delays; the requirement for personal documentation; a failure to implement decisions; high procedural and private legal assistance costs; and discriminatory attitudes and practices amongst the judiciary.

The strict patriarchal socio-cultural milieu and traditional attitudes compel women to partly or wholly waive their HLP rights, in order to avoid stigmatisation, ostracism, violence and similar sanctions. Furthermore, a significant lack of awareness of *mahr* and inheritance rights is one of the root causes of women's lack of access to HLP rights. This ignorance is especially pronounced in rural and remote areas and among the illiterate and uneducated. Despite the seemingly grim picture, legal practitioners have noticed an increasing number of cases of *mahr* and inheritance brought to court by women aware of the rights guaranteed to them by Afghan law although very much limited to urban areas (especially Kabul). But it does signal an important correlation between the level of awareness and the number of women willing to fight for their HLP rights before a court.

Even if there is awareness of the rights and a readiness to claim them, there is little available assistance on displaced women's land access, primarily due to stakeholders' specific portfolios (i.e. limited expertise, legal and geographical coverage), and the sensitivity of issues both from the perspective of women's rights and ownership of land as a valuable asset. Furthermore, the lack of personal and HLP documentation as well as the lack of legal aid and assistance denies women their legal standing and ability to give evidence before the statutory justice system. Faced with these barriers and the exorbitant costs associated with participating in statutory HLP procedures, displaced women often stop pursuing their cases or have no choice but to resort to customary mechanisms and accept often unfavourable compromises. In seven out of 24 case studies, women reached a compromise in order either to retain custody of their children or to live peacefully with their families.

Unable to break family ties and lead independent lives due to strict cultural norms and a dire lack of resources, most divorced and widowed women are limited to choosing between living in their father's, brother's or husband's house. Here they often live in inadequate living conditions and face harassment and control. The "compromise" is therefore reached in order to maintain a woman's socio-cultural status within the

acceptable limits of the customary norms by sacrificing some portion of her autonomy that she had fought hard to achieve in the first place.

Women's access to land, specifically, is a crucial element of economic empowerment. It increases participation in household decision-making, expands their range of choices, enables them to deal better with economic loss and crisis, and provides them with security and protection if and when they lose access to a man's income through widowhood or divorce. Women who feel secure and able to make decisions at home are also more likely to more actively participate in and contribute to their communities and societies.¹ For a woman in Afghanistan, claims to inheritance and *mahr* are not only issues of economic support, but also a struggle to assert their socio-cultural position in society. A woman claiming her inheritance and *mahr* is asserting her right to make her own decisions on issues that directly impact on her life – a right to autonomy that is uncommon for women in Afghanistan.

Displaced women face multiple layers of discrimination, as displacement-induced problems are exacerbated by regressive cultural attitudes and practices within Afghan conservative society. Women's legal and decision-making status remains linked to that of a male relative and they are unlikely to own land or otherwise attain security of tenure. Despite occasional success stories, Afghanistan is a resounding testimony to the general failure of both the government and the international community to effectively contribute to building an environment where a woman (let alone a displaced one) can freely compete for her rights. To effectively address the problem, stakeholders must commit to comprehensive and development-oriented interventions including: ensuring full observance of existing laws; intensive awareness raising; local targeted capacity building; systemic facilitation of access to documentation; the availability of legal aid and access to justice; and stronger cooperation and coordination aimed at ensuring the sustainability of the applicable solutions.

RECOMMENDATIONS:

The recommendations in the study are aimed at improving the environment in Afghanistan for displaced women in respect of their HLP rights. As such, the recommendations aim at providing a roadmap for:

- ▶ Addressing practical and institutional obstacles to justice for women.
- ▶ Strengthening stakeholder interventions and coordination.
- ▶ Building awareness and advocacy.

NRC calls for a national acknowledgement of displaced women's HLP rights and the identified issues affecting women's enjoyment of the rights nationwide. It also serves as a reminder of international standards on women's access to HLP rights and the importance of complying with them.

¹ UN Women, *Who Answers to Gazan Women? An Economic Security and Rights Research*, 2011, p. 113 as cited in Norwegian Refugee Council (NRC), *Realities from the Ground - Women's Housing, Land and Property Rights in the Gaza Strip*, 2013, p. 5.

To the Afghan Government – Ministry of Justice

- a. **Increase the availability of legal aid services** across Afghanistan to support women’s engagement in civil legal cases. Make services available in areas with high numbers of IDPs and refugee-returnees.
- b. **Develop collaborative legal aid schemes**, where possible, in cooperation with identified competent and capable non-governmental and community-based stakeholders, to address the legal aid needs of women in the course of traditional dispute resolution.
- c. **Consider piloting mobile court programmes** to increase access to justice for displaced women in remote and rural areas.
- d. **Ensure the full implementation of ERAW and related laws** including through the provision of training to law enforcement personnel on the psychological and security risks associated with women’s pursuit of HLP rights.

To humanitarian and development actors

- a. **Implement programmes that support the Ministry of Justice legal aid capacity.** Allocate funding for the development of legal aid services for women in high areas of return and areas with high numbers of IDPs. Raise funds for mobile courts programmes.
- b. **Conduct a feasibility study on mobile courts programme** aimed at enabling access to statutory justice for displaced women in remote rural areas of Afghanistan and, where applicable, support the programme to target remote and rural areas with a high concentration of displaced populations.
- c. **Support, fund, develop and consolidate data collection and analysis tools** related to HLP issues across the stakeholder landscape, under the IASC HLP Task Force. Place a special focus on the collection and analysis of qualitative information through the inclusion of qualitative performance and impact indicators into programme design.
- d. **Conduct tailored introductory, follow-up training and training-of-trainers (ToT) sessions** for local *jirgas*, *shuras* and communities on women’s HLP rights in the displacement context. These should be facilitated and provided by community-accepted and fully qualified trainers and aimed at specifically selected training target groups.
- e. Utilise media and technology, including wide coverage television, radio and mobile phone for **public outreach and awareness raising campaigns** about the most critical specifics of women’s HLP rights, through simple messages.
- f. Propose a clearly delineated **competence scope of traditional dispute resolution mechanisms** in terms of their acceptable engagement in legal issues related to women’s access to HLP.

ABBREVIATIONS & ACRONYMS

AGCHO	Afghanistan Geology and Cartography High Office
AIBA	Afghan Independent Bar Association
AIHRC	Afghan Independent Human Rights Commission
APC	Afghanistan Protection Cluster
AREU	Afghanistan Research and Evaluation Unit
AWN	Afghan Women Network
CDC	Community Development Council
CEDAW	Convention on the Elimination of Discrimination Against Women
CESCR	Committee on Economic, Social and Cultural Rights
DACAAR	Danish Committee for Aid to Afghan Refugees
DfID	Department for International Development
DRC	Danish Refugee Council
EC	European Commission
EVAW	Elimination of Violence against Women
FMR	Forced Migration Review
GBV	Gender-based violence
GIZ	Deutsche Gesellschaft für Internationale Zusammenarbeit
GoA	Government of Afghanistan
HLP	Housing, land and property
HRW	Human Rights Watch
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICG	International Crisis Group
ICJ	International Council of Jurists
ICLA	Information, Counselling and Legal Assistance
ICRC	International Committee of the Red Cross
IDLG	Independent Directorate of Local Governance
IDP	Internally displaced persons
ILAC	Information and Legal Assistance Centre
ILFA	International Legal Foundation in Afghanistan
IOM	International Organization for Migration
JICA	Japan International Cooperation Agency
LAOA	Legal Aid Organization of Afghanistan

LARA	Land Reform in Afghanistan
LAS	Land Allocation Scheme
LC	Legal counsellor
MAIL	Ministry of Agriculture, Irrigation and Livestock
MEI-FRS	Middle East Institute – <i>Foundation pour la Recherche Strategique</i>
MoHRA	Ministry of Hajj and Religious Affairs
MoJ	Ministry of Justice
MoRR	Ministry of Refugees and Repatriation
MoWA	Ministry of Women’s Affairs
MRRD	Ministry of Rural Rehabilitation and Development
NAPWA	National Action Plan for the Women of Afghanistan
NGO	Non-governmental Organization
NRC	Norwegian Refugee Council
OCHA	Office for the Coordination of Humanitarian Assistance
ODA	Official Development Assistance
OECD	The Organization for Economic Co-operation and Development
RIWPS	Research Institute for Women, Peace and Security
TLO	The Liaison Office
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNGA	United Nations General Assembly
UNAMA	United Nations Assistance Mission in Afghanistan
UNDP	United Nations Development Program
UNHCR	United Nations High Commissioner for Refugees
UNODC	United Nations Offices on Drugs and Crime
USAID	United States Agency for International Development
USIP	United States Institute for Peace
VAW	Violence against women
WCLRF	Women and Children Legal Research Foundation
WfAW	Women for Afghan Women

GLOSSARY

Baad	Traditional Pashtun practice in which a girl is traded to settle a dispute between two families.
Beswa	Smallest land measurement unit equal to 100 m ² (20 <i>beswas</i> = 1 <i>jerib</i>).
Jehezia	“Bride price” paid by the groom’s family to the bride’s family, also known as <i>walwar</i> (Pashto).
Jirga	Tribal mechanism of decision-making and conflict resolution, consisting of a council of male elders convened on <i>ad-hoc</i> basis to solve a specific issue based on local customary law and rituals, and restore peace within the community.
Jerib	Land measurement unit equal to 0.2 hectares.
Hanafi	The oldest and dominant school of (<i>Sunni</i>) Islamic law, applicable in Afghanistan, characterised by its liberal and reasoned approach to a range of legal and social issues.
Khul	Divorce initiated by the wife in return for compensation paid to her husband, in the form of a sum of money or <i>mahr</i> waiver.
Madhhab(s)	Major school of Islamic law and jurisprudence, including <i>Hanafi</i> , <i>Maliki</i> , <i>Shafi’i</i> , <i>Hanbali</i> (<i>Sunni</i>) and <i>Jaafari</i> (<i>Shi’ah</i>), differing in their approaches to handling and interpreting sources of law; written also as <i>madhaheb</i> .
Mahr	A mandatory dower or “marriage portion”, in the form of land, other property or a sum of money, which a husband provides to his wife upon marriage.
Mahram	Male escort – usually a close relative – allowed to accompany a Muslim woman when she travels.
Mullah	A Muslim skilled in religious law and doctrine.
Nekahkhat	Traditional marriage contract specifying the agreed <i>mahr</i> .
Nekahnama	Marriage certificate registered by the courts, revealing the stipulated <i>mahr</i> amount.
Pashtunwali	An unwritten ethical and tribal code of conduct among the Pashtun ethnic group in Afghanistan.
Qazi	A trained religious judge implementing <i>Shari’ah</i> .
Qur’an	The main religious text of Islam considered by Muslims as a revelation from God.
Shari’ah	Islamic law and moral code based on Qur’an, <i>Sunnah</i> and jurisprudence; here used in the context of <i>Hanafi</i> interpretation.
Shura	Group of elders or community leaders gathering to facilitate mutually agreed-upon decision-making for the community they represent.
Sunnah	The way of life prescribed as normative for all Muslims on the basis of the teachings and practices of Prophet Muhammad and authoritative interpretations of the <i>Qur’an</i> .
Tazkera	Personal identification document (ID card).
Ulema	Professional Islamic clerics in charge of the official interpretation of <i>Shari’ah</i> through issuance of authoritative opinions (<i>fatwas</i>).
Walwar	Bride price (Pashto term) – see <i>jehezia</i> .



INTRODUCTION

BACKGROUND

In 2011, NRC embarked on a five-year initiative aiming to increase displaced women's access to housing, land and property (HLP) rights through international and national advocacy. The project aims to provide well-researched legal, policy and practice recommendations for the humanitarian community, including practitioners, donors, governments and civil society.

The project's evidence base is drawn from NRC's extensive operational experience, for over 15 years, as a provider of information, counselling and legal assistance (ICLA) related to HLP rights in 15 countries afflicted by conflict or recovering from it. The project's analysis and recommendations are based both on assessments of NRC's legal cases and commissioned country research.

For more information, visit womenshlp.nrc.no or contact Kirstie Farmer, NRC's HLP Advocacy Advisor (kirstie.farmer@nrc.no).

NRC'S ICLA PROGRAMME IN AFGHANISTAN

NRC's ICLA programme has been active since 2003 as the major provider of legal aid across Afghanistan. Currently, ICLA operates in six offices in Herat, Jalalabad, Kabul, Kunduz, Maimana and Mazar-i-Sharif, covering 16 Afghan provinces. The programme employs around 100 licensed legal counsellors, legal trainers, community liaison officers and related programme staff.

ICLA provides information, counselling, legal assistance and capacity building to enable beneficiaries to claim and exercise their rights to housing, land and property (HLP) and legal identity documents and other documentation. Accurate, timely and reliable information and counselling is provided on the conditions pertaining to return, local integration or resettlement, available assistance providers, as well as the rights arising from national statutory law, international human rights standards and religious/customary norms and practices. ICLA also provides quality legal assistance in civil law cases, including legal representation before statutory and traditional justice mechanisms, toward the final resolution of HLP disputes and to ensure beneficiaries' security of tenure. A particular strength of ICLA is support for engagement with traditional dispute mechanisms (*jirga, shura*), when deemed appropriate. The programme also assists beneficiaries in dealing with complex processes and the often high costs of obtaining HLP-related and personal civil documents required for accessing rights and services and the achievement of durable solutions. Over 3,320,000 people have benefited from the services since the programme began.

Aimed at further increasing beneficiaries' access to justice, ICLA undertakes capacity building and awareness raising activities for

decision makers, legal professionals and other stakeholders. This is done primarily through participatory training and awareness raising sessions on property, inheritance, family law, civil law and related procedures, collaborative dispute resolution and international human rights law – with a focus on women's rights and representation. So far, ICLA has trained 19,500 persons. Based on its expertise, ICLA has actively contributed to a range of advocacy initiatives resulting in positive legislative changes, good practices and an improved quality of life for its beneficiaries.

1.3

OBJECTIVES OF THE RESEARCH

Strengthening women's HLP rights is an area of humanitarian response in which NRC has developed considerable expertise. An analysis of NRC's experience in supporting displaced women in Afghanistan can provide a better understanding of the challenges they face in order to strengthen the provision of legal assistance services. It is hoped that durable solutions can be found through the development and documentation of NRC's activities supporting Afghan women's security of tenure.

This research focuses on women's HLP rights in Afghanistan and looks at the continuing HLP challenges that women face in Afghanistan. It assesses how the Afghan legal system, including both statutory and traditional dispute resolution mechanisms, protect HLP rights, and to what extent the international community is helping to protect these rights. More specifically, the report offers evidence and guidance to help eliminate the roots – not just outcomes – of gender inequality with specific regard to HLP rights. Based on the findings, the report also makes recommendations through which the international community, government, NRC and other stakeholders can work together to strengthen women's HLP rights. It also aims to facilitate critical thinking to improve crucial aspects of the displaced women's lives.

The report focuses on women displaced by conflict, natural or man-made disasters, as a key vulnerable group in Afghanistan that requires targeted assistance.² However, an analysis of their situation provides a rich evidence base that can be used to design successful policy and legislative interventions to improve the lives of all women in Afghanistan.

² See e.g. NRC, IDMC, JIPS and Samuel Hall, *Challenges of IDP protection – Research Study on the protection of internally displaced persons in Afghanistan*, November 2012, available at: https://www.nrc.no/arch/_img/9665970.pdf.

RESEARCH QUESTIONS

This research sought to provide evidence and guidance for NRC, stakeholders and policymakers by providing the following:

- a. A contextual overview of the impact of displacement on addressing women's land issues in post-conflict Afghanistan;
- b. An overview of the essential characteristics and relational complexities of statutory and traditional justice sectors;
- c. A review of the applicable international and national legal frameworks governing women's HLP rights in Afghanistan, with specific focus on inheritance and *mahr*;
- d. The identification of "ground realities", i.e. the economic, socio-cultural and institutional obstacles in resolving HLP disputes and their impact on women's enjoyment of HLP rights;
- e. A brief assessment of the capacities of stakeholders to address identified challenges;
- f. Recommendations for addressing the observed obstacles, improving the legal and institutional framework and addressing programmatic gaps of engaged aid agencies.

RESEARCH METHODOLOGY

The report is based on both primary and secondary sources, and uses a qualitative approach. A literature review was conducted by external research consultants, and primary sources – principally in the form of case studies and testimonies – were provided by ICLA legal counsellors located in six offices in Herat, Jalalabad, Kabul, Kunduz, Maimana and Mazar-i-Sharif, with operational outreach to a total of 16 provinces. The report is based on the following specific sources:

- a. NRC ICLA country database contents related to HLP and related caseload recorded from 2005-2013 (inclusive) across the NRC-operation areas (with mahr cases recorded only in 2012-2013 in Balkh, Faryab, Herat and Kabul), offering an insight into geographical patterns and evolution of the cases, as well as the development of the ICLA programme in general.
- b. A random selection from the NRC database of cases directly assisted by NRC's legal counsellors up to December 2013, with 24 selected in-depth case studies processed by December 2012 (23) and 2013 (1). The legal records and case studies contain information generated from direct field experience, and interaction with beneficiaries, community elders, religious authorities, judges and other stakeholders involved in dispute resolution.

- c. Key-informant interviews (up to two-hour duration, one or more per stakeholder organisation) conducted in the period December 2012 to January 2013. The interviews involved:
- ▶ Government agencies: Afghanistan's Independent Land Authority (Arazi), Independent Directorate of Local Governance (IDLG), Ministry of Justice (MoJ), Ministry of Refugees and Repatriation (MoRR), Ministry of Women's Affairs (MoWA), Ministry of Hajj and Religious Affairs, Afghan Independent Human Rights Commission (AIHRC);
 - ▶ International community: United Nations High Commissioner for Refugees (UNHCR), UN Development Programme (UNDP), UN Women, European Community (EC), Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ), United States Agency for International Development (USAID), Human Rights Watch (HRW) and NRC;
 - ▶ National NGOs: Afghanistan Research and Evaluation Unit (AREU), Afghan Women Network (AWN), Legal Aid Organization of Afghanistan (LAOA) and Women for Afghan Women (WfAW);
 - ▶ Legal practitioners, researchers and human rights activists.
- d. Key-stakeholder Recommendation Workshop (March 2013) outputs, based on contribution of 60 participants from: AIHRC, MoJ, MoRR, Ministry of Rural Rehabilitation and Development (MRRD), Afghan Independent Bar Association (AIBA), Office for Coordination of Humanitarian Affairs (OCHA), UN Assistance Mission in Afghanistan (UNAMA), UNDP, UNHCR, UN Women, Canadian Embassy, EC, Japan International Cooperation Agency (JICA), USAID, United States Embassy, NRC, Danish Refugee Council (DRC), Action Aid, Checchi Consulting, Danish Committee for Aid to Afghan Refugees (DACAAR), Land Reform in Afghanistan (LARA), Terra Institute, The Liaison Office (TLO), Research Institute for Women, Peace and Security (RIWPS), Women and Children Legal Research Foundation (WCLRF)
- e. Desk research conducted throughout the project, involving publications by UN agencies, AIHRC, NRC, specialised legal institutions and independent research organisations.



CONTEXT

“ 76 per cent of the Afghan population had experienced displacement ”

BACKGROUND

The plight of women in Afghanistan is of renewed interest, and heightened concern, at a time of transition. The situation of Afghan women has been on donor agendas since Afghanistan became the focus of international attention in 2002. Having completed more than 10 years of assistance, the international community is now at a cross roads – time bound and in the face of declining funding, priorities are being revisited, performances are being evaluated and expectations are being lowered.

The international community has worked, in fragmented measures, to provide equitable access to justice for women. Out of the total 62 billion USD OECD-ODA pledged funds for the period 2002-2013, by 2009 the governance and the rule of law allocation constituted 12 per cent.³ As the highest (62 per cent) sole contributor among the OECD-ODA donors in Afghanistan,⁴ the United States of America has spent at least 223 million USD since 2005 on justice sector development programs.⁵ The specific allocation to gender programmes is not precisely known - it is considered a small portion of the (12 per cent) ODA which is allocated to unclassified cross cutting issues.⁶

There are legitimate concerns that the withdrawal of the international military presence may thwart efforts to improve (or even maintain) women's position and rights in Afghan society. In the existing context of endemic protracted displacement, scarcity of arable land, widespread “land grabbing”, overall insecurity and depleted foreign aid, Afghan women's access to HLP rights, particularly land, represents an area of heightened concern.

For many Afghan women, security of tenure is only achieved through their relationship with men – their fathers, husbands, brothers or sons. Prescribed inheritance shares and required dower (*mahr*) represent two main opportunities for women to acquire ownership of land and housing and achieve security of tenure. Although women do not have equal inheritance rights under *Shari'ah*, they do have the right to some inheritance – at best, half of what is allocated to a male heir – mainly through the acquisition of land or its monetary value. *Mahr* is a token of respect that every woman should receive from her husband as part of a marriage contract, in land, money and/or personal items. At the end of their relationships with men through either death or divorce, women become vulnerable to losing the possessions and security against the competing interests of dominant family members. The scarcity of arable land in Afghanistan renders it extremely valuable and, as such, the primary sign of economic and political power.

3 GoA Ministry of Finance, Donor Financial Review, November 2009, pp. 9, 13, available at: <http://www.undp.org.af/Publications/KeyDocuments/Donor'sFinancialReview%20ReportNov2009.pdf>.

4 *Ibid.*, pp. 38-41.

5 Special Inspector General for Afghanistan Reconstruction (SIGAR), Support for Afghanistan's Justice Sector: State Department Programs Need Better Management and Stronger Oversight, SIGAR 14-26 Audit Report, January 2014, p. 1, available at: http://www.sigar.mil/pdf/audits/SIGAR_14-26-AR.pdf.

6 See GoA Ministry of Finance, *op. cit.*, pp. 13-14. With regard to individual ODA donors' gender equality focused aid, see e.g. OECD, Aid in Support of Gender Equality and Women's Empowerment: Statistics based on DAC Member's reporting on the Gender Equality Policy Marker, 2007-2008, March 2010, available at: <http://www.oecd.org/dac/stats/42759705.pdf>.

KEY CONCEPTS AND MEANS OF ACQUIRING HLP RIGHTS

Women's HLP rights

Women's legal rights to "access to and control over housing, land and property" broadly referring to security of tenure in terms of "rights to own, lease, rent mortgage or dwell on land, housing and property and the right not to be forcibly evicted."⁷

Mahr

The property (immovable, movable) or a sum of money which a Muslim wife is entitled to receive from her husband on the occasion of concluding the marriage, as a token of respect. It is a woman's right guaranteed by *Shari'ah* and Afghan national law and stipulated in the marriage contract. If the contract does not include provisions on *mahr*, the wife can request it at any time and the court should direct the husband to comply. *Mahr* is very **distinct** from (yet often confused with) *jehezia* or "bride price" that indicates a sum paid by the groom's family to the bride's family in return for the groom's right to marry their daughter. It is also different from dowry as used in marriage contexts elsewhere to indicate the bride's contribution (in property or money) to the marriage. *Mahr* is received from the husband unconditionally and represents a woman's personal property.⁸

Inheritance

"[W]hatever one receives upon the death of a relative due to laws of descent and distribution, when there is no will."⁹ While inheritance may also incorporate anything received from the estate of the deceased, the term is used here only in the context of intestate succession, i.e. inheritance by the law - not by the will/testament which is governed by separate legal provisions.

The rights to *mahr* and inheritance are the key women-related HLP rights representing the **primary means of acquisition and use of property** directly impacting on Afghan women's economic empowerment. *Mahr* and inheritance **usually take the form of land** (especially in rural/remote areas) upon which women should theoretically exert complete ownership rights.

DISPLACEMENT

2.2

A 2009 Ipsos/ICRC study concluded that 76 per cent of the Afghan population had experienced displacement,¹⁰ as this has traditionally been the primary coping strategy of Afghans dealing with conflict, precarious economic conditions and high levels of insecurity. Following the fall of the Taliban regime in 2001, an unprecedented 5.7 million people returned to Afghanistan. The last decade has also seen increasing

7 UNHCS (Habitat), Women's Rights to Land, Housing and Property in Post-Conflict Situations and During Reconstruction; a Global Overview, 1999, p. 10, available at: <http://www.unhabitat.org/pmss/listItemDetails.aspx?publicationID=1926>. For detailed HLP definitions, see e.g. NRC and IDMC, Housing, Land and Property Training Manual, June 2013, available at: <https://www.nrc.no/?did=9642898>.

8 See e.g. Conor Foley, A Guide to Property Law in Afghanistan, Second Edition, NRC Kabul 2011, p. 63.

9 Gerald N. Hill and Kathleen Thompson Hill, The People's Law Dictionary, 2005, available at: <http://dictionary.law.com>.

10 Ipsos/International Committee of the Red Cross (ICRC), Our world. Views from the Field. Afghanistan: Opinion Survey and In-Depth Research, December 2009, p. 6, available at: <http://www.icrc.org/eng/assets/files/2011/afghanistan-opinion-survey-2009.pdf>.

“ The transition from international military to Afghan national security forces holds an uncertain future ”

internal displacement throughout the country, with a currently estimated 685,000 conflict-related IDPs.¹¹ Additionally, there are over 2.4 million registered and an estimated 2.4 million undocumented Afghan refugees in Iran and Pakistan.¹²

The deterioration of the security and humanitarian context in Afghanistan suggest that displacement is likely to keep intensifying over the coming years and it has already become a key humanitarian challenge facing the country and the humanitarian community. On the other hand, the number of returns to the country is likely to keep falling. In 2012, for “the first time since 2002 and the beginning of the current war in Afghanistan more Afghans are leaving than returning.”¹³ In 2013, the numbers returning were 46 per cent lower compared to 2012 and there are similar estimates for 2014.¹⁴ The transition from international military to Afghan national security forces holds an uncertain future for the country, which is likely to confirm the population movement trends.

In April 2014, northern Afghanistan experienced the worst flooding in 100 years. More than 6,500 families had their homes completely destroyed whilst over 14,000 families were affected by the floods. Furthermore military operations by the Government of Pakistan against non-state armed actors in North Waziristan Agency (NWA) resulted in significant population movements into Afghanistan. By early August 2014, 22,530 families¹⁵ (over 180,000 individuals) had been assessed in Eastern Afghanistan signaling a significant worsening of the humanitarian situation.

SPECIFIC VULNERABILITY

While there are cases of successful displacement solutions, the experience of displacement is often traumatic for Afghan families who have to adapt to a new environment without their traditional support networks and usual livelihood strategies. Several studies have documented specific vulnerabilities and protection needs (including greater poverty status) that characterise displaced populations in Afghanistan through different phases of displacement and, especially, with regard to finding durable solutions.¹⁶ These studies found the main areas of vulnerability of IDPs in Afghanistan to be unemployment, shelter and housing, and water and food needs.

11 See OCHA, Humanitarian Bulletin: Afghanistan, August 2014 available at: http://www.humanitarianresponse.info/system/files/documents/files/MHB_August_2014_Final.pdf

12 UNHCR, Solutions Strategy for Afghan Refugees: Summary Progress Report, September 2013, pp. 3-4, available at: <http://www.unhcr.org/522722e99.html>.

13 Carberry, Sean, 2012, “Afghans Begin New Exodus, Often At Great Cost”, NPR, December 2, 2012, available at: <http://www.npr.org/2012/12/02/166018997/afghans-begin-new-exodus-often-at-great-cost>.

14 OCHA, op. cit., p. 10.

15 OCHA; Humanitarian Bulletin, Afghanistan, August 2014: Available at: http://www.humanitarianresponse.info/system/files/documents/files/MHB_August_2014_Final.pdf

16 See e.g. Nassim Majidi, “Urban Returnees and Internally Displaced Persons in Afghanistan” in MEI – FRS (January 2011), available at: http://www.refugeecooperation.org/publications/Afghanistan/01_majidi.php. See also NRC, IDMC et al., op.cit.

Amongst the displaced populations (refugee returnees and IDPs), it is primarily women and children who suffer more acutely upon displacement. In particular, internally displaced women are more likely than the rest of the population to be unemployed and suffer from a lack of access to basic needs, such as food, water and shelter. Employed female IDPs were found to earn 4.3 times less than their male counterparts, i.e., overall IDP women earned 23-47 times less than men if counting their total involvement in economic activities.¹⁷ There is also a higher proportion of widows and female-headed households among them.¹⁸ IDP women are also more likely to become victims of various forms of violence upon displacement - 64 per cent have faced domestic violence and 32 per cent of those face it every day.¹⁹

“ Women and children suffer more acutely upon displacement.”



17 NRC, IDMC et al., *op.cit.*, pp. 8, 28.

18 *Id.*, pp. 7-8, 36.

19 *Id.*, pp. 34-35.

HLP CIRCUMSTANCES

Displacement has a direct impact on the HLP situation as it significantly increases the risk of land disputes and conflicts. Several HLP-related issues accompany displacement:

Land grabbing

Land in Afghanistan has a very high value – especially arable land that constitutes only 10 per cent of the country's territory.²⁰ Due to its scarcity, land is considered the primary sign of economic and political power in the country.²¹ The rapid urbanisation of key areas has further fuelled the demand for land, leading to conflict when land grabbing occurs. Land grabbing was particularly widespread during the Soviet invasion and the following years of civil war, as local commanders and warlords used the opportunity to increase their own property holdings. Similarly, relatives and other interested individuals and groups who stayed behind, misappropriated land left behind by families fleeing the conflict, resulting in a *de-facto* redistribution of land.

After many years of absence, the refugee and IDP-returnees have not been able to repossess their land and properties. The massive return movements triggered many local land disputes and conflicts and eventually resulted in the establishment of the Special Property Disputes Resolution Court in 2003 which was intended to address complex land issues involving the displaced.²² After only two years, and with only a little over 5 per cent of the cases processed and 80 per cent of the decisions appealed,²³ the court collapsed due to the “absence of enforcement capacity, inaccessibility and corruption”.²⁴ Land grabbing remains a highly pervasive social and legal phenomenon due to, amongst other things, the lack of effective protection mechanisms against it.²⁵

20 Total arable land area is 6.5 million hectares or around 10% of the country's territory. The rest of the land is categorised as extensive grazing, desert or high mountain and permanent ice. Hector Maletta, *Arable Land Tenure in Afghanistan in the post Taliban era*, 22 February 2007, p. 10, available at: [https://www.cimicweb.org/cmo/Afghanistan/Crisis%20Documents/Social%20Well-Being/SCD%20Top%20News/SSRN-id908669\[1\].pdf](https://www.cimicweb.org/cmo/Afghanistan/Crisis%20Documents/Social%20Well-Being/SCD%20Top%20News/SSRN-id908669[1].pdf); Olaf Thieme, *Country Pasture/Forage Resource Profiles: Afghanistan*, FAO, 2006, p. 5, available at: <http://www.fao.org/ag/agp/AGPC/doc/Counprof/afgan/afgan.htm>.

21 Ingrid Macdonald, “Landlessness and Insecurity: Obstacles to Reintegration in Afghanistan” in *Middle East Institute – Foundation pour la Recherche Strategique (MEI-FRS)*, February 2011, p. 3, available at: http://www.refugeecooperation.org/publications/Afghanistan/04_macdonald.php.

22 Decree 89 of the Head of the Transitional Islamic State of Afghanistan regarding the Creation of a Special Property Disputes Resolution Court, 30 November 2003. For details, see e.g. NRC, *A Report on: Afghanistan's Special Property Disputes Resolution Court*, September 2005, available at: [http://www.internal-displacement.org/8025708F004CE90B/\(httpDocuments\)/7B294E9B3DAE1B2A802570B700587CBF/\\$file/Report+-+Afghanistan's+Special+Property+Disputes+Resolution+Court.pdf](http://www.internal-displacement.org/8025708F004CE90B/(httpDocuments)/7B294E9B3DAE1B2A802570B700587CBF/$file/Report+-+Afghanistan's+Special+Property+Disputes+Resolution+Court.pdf).

23 Liz Alden Wily, *Land, People, and the State in Afghanistan: 2002-2012*, Afghanistan Research and Evaluation Unit (AREU), December 2012, p. 80, available at: <http://www.areu.org.af/Uploads/EditionPdfs/1303E%20Land%20II%20CS%20Feb%202013.pdf>.

24 Megan Bradley, “Obstacles to realizing Guiding Principle 29 in Afghanistan” in *Forced Migration Review (FMR) – GP10*, December 2008, p. 25, available at: <http://www.fmreview.org/FMRpdfs/GP10/GP10.pdf>.

25 The draft law was adopted by the Lower House (Wolesi Jirga) of the Parliament on 23 September 2013 and it is pending before the Upper House (Meshrano Jirga). The draft law is on file with NRC.

In 2013, a draft *Law on Grabbing and Illegal Occupation of State-Owned and Private Property* was put before the Parliament, seeking to prevent and punish the illegal grabbing of private and public land by powerful individuals. Notwithstanding the good intentions, the potential practical effects of the law, once passed, may prove to be controversial, including for vulnerable displaced women.

Physical access

Due to the security situation, many displaced groups have lost access to their places of origin and lands, which complicates the process of claiming their rights. Furthermore, refugee-returnees and IDPs prefer secure locations where they are able to make a living and where other essential services and opportunities are available. For example, only 23 per cent of over 1,000 IDPs surveyed in 5 provinces (Faryab, Herat, Kabul, Kandahar and Nangarhar) intended to return to their place of origin, against 76 per cent wanting to integrate locally.²⁶ According to the national law, a land conflict has to be settled in the place where the land is located. The displaced persons who lose access to their place of origin could, therefore, initiate a complex procedure to transfer jurisdiction to a closer court. Distance further weakens the influence of the court making it even less likely that the court decision will ever be implemented.

Documentation

HLP rights are conditioned upon possessing adequate personal (birth certificates, marriage certificates, *tazkeras* etc.) and land-related documentation (customary deeds, official titles, tax receipts etc.). This is very difficult in a context where the majority of Afghans do not possess the documents because either the land or property has never been registered or recorded and they are no documents or they have been lost.

Identity documents or *tazkeras* are particularly important, as in order to initiate a procedure before the statutory justice system a person must present an identity document. Yet, they are very often not available to displaced widows, female-headed households or displaced women estranged from their husbands, as women are included in the personal documentation of their male relatives or husband. The lack of documentation is a particularly acute issue for displaced women – for example 81.8 per cent of IDP women do not have a *tazkeras* as opposed to 16.6 per cent of IDP men in the same situation.²⁷ Without the documentation, there is no possibility for them to claim their rights independently. This

²⁶ NRC, IDMC et al., op. cit., p. 47.

²⁷ Ibid., p. 41. A recent study by TLO supports this conclusion in finding that certain groups own *tazkeras* far less than others; especially women and rural, displaced and nomadic populations. However, the study notes a significant difference between rural and urban areas. In the study, urban women are much more likely to have the document, compared with their rural counterparts. The study concluded that the rural-urban factor influenced *tazkera* ownership more than displaced status per se. The Liaison Office (TLO), An Exploratory Study of Afghan *Tazkera* Ownership, p. vii.

“ Displacement often means the loss of support networks... The impact on women can be catastrophic.”

is of a particular importance when the husband or the relative is a party in the dispute.

Additionally, from an evidentiary perspective, the lack of institutionalised marriage registration for an estimated 80 per cent of the general population,²⁸ as well as the lack of formalisation of “more than 50 per cent of the land tenure”, including inheritance transfers²⁹ makes it even more difficult for women to successfully claim any rights to land or other property.

Traditional protection

Displacement often means the loss of traditional protection/support networks and social isolation that can prove very challenging for Afghan women. Cultural norms dictate that a woman’s world is mainly – if not exclusively – limited to her house and family. When this setting is destroyed, the impact on the woman can be catastrophic, as she is required to quickly adapt to the new social environment and its challenges. There is a high prevalence of widows and female heads of households among the displaced and this reflects the reality, which is that male support is usually required to effectively navigate through both statutory and traditional dispute resolution mechanisms to claim and realise their HLP rights.

Economic stability

The significance of women’s HLP rights lies in the degree of economic independence that they provide. For displaced women who do not have a familial support base, her land becomes a safety net for basic survival. Land, as opposed to moveable assets, provides stability and, potentially, a source of income. For a typical movement-restricted Afghan woman, land ownership can bring an economic independence which can protect her from unwanted social interference. It is also a prerequisite for overall independent decision making and can enable women to steer their lives devoid of others detrimental influences and interests. On a broader scale, improvements in women’s access to and control of economic resources can have a positive effect on a range of development goals, including poverty reduction and economic growth. Rural women, in particular, are at the strategic centre of reducing hunger, malnutrition, and poverty.³⁰

“ For displaced women, land becomes a safety net for basic survival.”

28 Latifa Sultani, Coordinator of Women’s Rights at the Human Rights Commission, interview available at: <http://www.wadsam.com/80-of-marriages-in-afghanistan-are-not-legally-registered-2342>.

29 Ingrid Macdonald, op.cit., p. 4. Cf. Alan Roe, “Water Management, Livestock and the Opium Economy – Natural Resources Management Farming Systems and Rural Livelihoods” in Synthesis Paper Series, AREU, November 2008, p. 25, available at: http://img.static.reliefweb.int/sites/reliefweb.int/files/resources/855A159D714CBB77492574F500275D8C-Full_Report.pdf.

30 USAID, “Land Tenure, Property, Rights, and Gender: Challenges and Approaches for Strengthening Women’s Land Tenure and Property Rights”, Property Rights and Resource Governance Briefing Paper No 7, 2011, p.1, available at: http://usaidlandtenure.net/sites/default/files/USAID_Land_Tenure_Gender_Brief_0.pdf.

3



DISPUTE RESOLUTION MECHANISMS

OVERVIEW: COMPETING JUSTICE SECTORS

Women's HLP rights and their protection fall within the ambit of the justice sector. The Afghan justice sector is complex, comprising of multiple dispute resolution mechanisms, sources of law and jurisprudence and implementing agents. The statutory justice sector (also referred to as "formal justice") comprises governmental/state institutions and processes, while the traditional one ("informal justice") comprises customary and religious community-based local mechanisms for dispute resolution (*jirgas* and *shuras*). Splitting the legal system into statutory and traditional has been the hallmark of Afghanistan, reflecting the multi-layered legal history of the country.³¹ Diverse statutory normative and institutional frameworks have been introduced over the course of time, each overlapping and conflicting with the previous one.

Until the formation of the modern state of Afghanistan in the late 19th century, Islamic scholars (*ulema*) maintained an independent legal system of laws and provided trained religious judges (*qazis*) to interpret it. *Ulema* perceived the customary system as illegitimate and sought to replace its practices with more standard interpretations of *Shari'ah*. Meanwhile, traditional dispute resolution mechanisms, where community leaders are called to administer justice, have persisted, being especially active in rural areas where the majority of the Afghan population live. Throughout the 20th century, the autonomy of *ulema* was progressively restricted through governmental secular reforms – up until the 1990s when the Taliban repealed the secular laws on the basis that *Shari'ah* provided a comprehensive system.³² When the Taliban fell in 2001, the transitional government did the same as their predecessors – set up new strategic plans, laws and institutions in an attempt to override the existing ones. But due to the lack of a uniform and country-wide implementation of the new laws, the result is a complex blend of old and new state and local institutions applying a hybrid of seemingly irreconcilable statutory, religious and customary laws.

The influence of these competing and overlapping justice mechanisms varies across geographical areas and across case types, and while each sector proclaims its autonomy and exclusive legal authority, no single sector has been able to completely displace the other.³³ As observed by Thomas Barfield, "the sectors continue to interact in such a way that any single legal dispute has the capacity to migrate from one sphere to another and thus plays a large role in how an issue is ultimately resolved."³⁴

31 Martin Lau, *Afghanistan's Legal System and its Compatibility with International Human Rights Standards: Final Report*, International Council of Jurists (ICJ), 7 February 2003, para 10, available at: <http://www.refworld.org/docid/48a3f02c0.html>.

32 Thomas Barfield, "Culture and Custom in Nation-Building: Law in Afghanistan", *Maine Law Review*, Vol. 60, No 2, 2008, pp. 352-353, available at: http://mainelaw.maine.edu/academics/maine-law-review/pdf/vol60_2/vol60_me_l_rev_347.pdf.

33 See Thomas Barfield, *ibid.*, p. 351.

34 *Ibid.*, p. 351.

The lack of full clarity as to the hierarchy between the justice sectors and the actors' roles, powers and capacities remains a serious challenge. When the international community, together with the Afghan transitional government, took over the responsibility for reforming the justice system, it is this dense milieu of the “what existed”, “what exists”, and “what should exist” that they encountered.

STATUTORY JUSTICE

The key institutions of the Afghan statutory (civil) justice sector for resolving HLP disputes include the court system, the Ministry of Justice (MoJ)³⁵, the Office of the Attorney General and the Police. The court system is comprised of the primary courts (at provincial and district level), general appellate courts (at provincial level) and the Supreme Court. The MoJ's district *Hoqooq* or law departments are primarily in charge of collecting relevant documentation and trying to encourage the parties to settle the case without resorting to the court.³⁶ Otherwise, the statutory justice sector takes a largely adversarial approach to determining cases.

In 2002, the legal system of Afghanistan was deemed to be falling short of international human rights standards.³⁷ Since then, a number of donors like USAID and the European Commission (EC) have invested resources to reconstruct the statutory justice sector. However, due to insufficient and uncoordinated investments focused on “patchy ‘legal engineering’ and quick fixes”,³⁸ the results remain manifestly unsatisfactory.

“ [T]he formal justice sector in Afghanistan remains in a severely dilapidated state, unable to reach most of the country and functioning poorly in areas where it is present.”³⁹ ”

The statutory justice sector has yet to overcome a number of barriers, including those related to the consolidation of state structures and political willingness to enforce laws. Some of the key challenges in this regard are:

- a. **Weak geographic presence and operational capacity** – In 2010 there were 360 (88 per cent) formally operational primary (district and city) courts and 36 appellate courts, with the estimated citizen-to-judge

35 Specifically law/Hoqooq and legal aid departments.

36 For details, see e.g. NRC, *Building Linkages between the Formal and Informal Justice Systems in Afghanistan: A Review of Collaborative Approaches in the Province of Herat: Final Report, August 2009*, pp. 6-7, available at: http://www.nrc.no/arch/_img/9683690.pdf.

37 Martin Lau, *op. cit.*, paras 2, 84.

38 Ali Wardak, “State and Non-State Justice Systems in Afghanistan: The Need for Synergy”, *U. P. J. Int'l L.*, Vol. 32, No. 5, October 2011, available at: [https://www.law.upenn.edu/journals/jil/articles/volume32/issue5/Wardak32U.Pa.J.Int'lL.1305\(2011\).pdf](https://www.law.upenn.edu/journals/jil/articles/volume32/issue5/Wardak32U.Pa.J.Int'lL.1305(2011).pdf).

39 Noah Coburn and John Dempsey, “Informal Dispute Resolution in Afghanistan”, *USIP Special Report 247*, August 2010, p. 2, available at: <http://www.usip.org/sites/default/files/sr247.pdf>.



ratio across provinces ranging from 317-to-one to 76,200-to-one.⁴⁰ While the majority of the courts are physically in place, they are often inoperative due to insecurity and insufficient material and human resources, and this, especially in rural areas, prevents effective access to statutory justice.

- b. Lack of qualified staff** – As a result of prolonged, conflict-induced expulsion of a large portion of the Afghan population and interference by government, the judiciary in particular, has suffered from significant de-professionalisation. A survey conducted in 2007 revealed that only around half of judges had a bachelor degree in law or *Shari'ah*,⁴¹ and that the majority of Judges did not have access to legal text books, statutes, case law or to quality professional support.⁴² It is also evident that the quality of legal expertise declines sharply away from Kabul.

40 International Crisis Group (ICG), "Reforming Afghanistan's Broken Judiciary", Asia Report No 195, 17 November 2010, pp. 17-18, 23, available at: <http://www.crisisgroup.org/~media/Files/asia/south-asia/afghanistan/195%20Reforming%20Afghanistans%20Broken%20Judiciary.pdf>.

41 Livingston Armytage, "Justice in Afghanistan: Rebuilding Judicial Competence after the Generation of War", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (fZaöRV)* 67, 2007, pp. 190-191, available at: http://www.zaoerv.de/67_2007/67_2007_1_b_185_210.pdf.

42 *Ibid.*, p. 196.

- c. Gender imbalance** – The number of female legal professionals is extremely low but numbers have increased. The number of female judges has increased from 41 in 2007 to 180 in 2013, meaning they now make up 10 per cent of the judiciary. The large majority (90 per cent) are based in Kabul, with the rest in only four other provinces. The reasons for the low numbers can be seen to be a result of the specific obstacles that they face, including social stigmatisation of women who work with men or work at all outside their homes, and being targeted by anti-government groups.
- d. Onerous procedural requirements** – To conduct litigation, Afghans are required to possess the relevant personal and evidentiary documentation, have sufficient financial resources to pay administrative taxes and other procedural costs, as well as have basic literacy and an awareness of the full scope of their rights. While in other contexts this is reasonable, in the context of Afghanistan and especially for Afghan women, such requirements are difficult to meet and pose direct and indirect obstacles that prevent them from accessing the justice sector.
- e. Corruption and declining ethical standards**⁴³ – Statutory justice is generally perceived as corrupt and as largely serving the interests of local power-holders. A study by the United Nations Office on Drugs and Crime found that 18 per cent of the population had paid a bribe to a Judge in the last year⁴⁴ with the amount being over on average over 200 USD.⁴⁵ Despite the rise of judicial salaries from 60 USD in 2001 to 400-900 USD in 2010,⁴⁶ the problem or susceptibility to corrupt practices remains. According to the same study, law enforcements officials (police, local administrations) ranked first in the receipts of bribes.⁴⁷
- f. Inadequate adjudication and implementation** – A very high proportion of court decisions are challenged, with 80 per cent of the primary courts and 70 per cent of the appeal courts decisions being appealed which indicates a high level of dissatisfaction with decision making.⁴⁸ There is a lack of information about the adequacy of implementation of decisions but in 2010, 52 per cent of Afghans reported that they did not have confidence in the statutory justice and 58 per cent of the population does not have confidence in the courts' ability to resolve cases within a reasonable time indicating that implementation is poor.⁴⁹

*Pashtunwali jirga has its own enforcement body called **Arbakai**. Arbakai is a group of adult volunteers, selected by a special procedure, who implement the jirga's decisions, secure the territory of the tribe or the respected community and take action against those who want to perform an illegal act. They are given considerable immunity in their communities and cannot be harmed or disobeyed.*

43 See Transparency International, Corruption Perception Index 2013, available at: <http://cpi.transparency.org/cpi2013/results> records Afghanistan as the third most corrupt country in the world.

44 ICG, op. cit., p. 1. Cf. 10-20% of the population paid bribes to governmental officials in the course of only one year - over 40% (urban areas) to almost 60% (rural areas) is paid to judges. United Nations Office on Drugs and Crime (UNODC), Corruption in Afghanistan: Bribery as Reported by the Victims, January 2010, pp. 24-25, available at: <https://www.unodc.org/documents/data-and-analysis/Afghanistan/Afghanistan-corruption-survey2010-Eng.pdf>. Cf. The Asia Foundation, Afghanistan in 2010: A Survey of the Afghan People, p. 88, available at: <http://asiafoundation.org/publications/pdf/797>.

45 19% of the total bribes over 1,000 USD are paid to judges. UNODC, op. cit., pp. 26-27.

46 Ibid., p. 24.

47 Ibid

48 Livingston Armytage, op. cit., p. 188.

49 The Asia Foundation, op. cit., p. 132.

TRADITIONAL JUSTICE

In present-day Afghanistan, there are more than 40 diverse ethnic groups⁵⁰ including an estimated 42 per cent Pashtun (the majority in the South and East), 27 per cent Tajik (in the Northeast), nine per cent Hazara and nine per cent Uzbek (in the North-central region), nine per cent Aimak, three per cent Turkmen and two per cent Baloch.⁵¹ Each of these ethnic groups enforces their own customary norms. The key mechanisms within the traditional justice sector are *jirgas*, *shuras* and independent mediation by family and respected community members. The most common type of *jirga* is the Pashtunwali convened by the Pashtun ethnic group. Other ethnicities do not maintain a strict tribal structure and resort mainly to shura as a more facilitative rather than decision-making mechanism.

The traditional mechanisms exist alongside the statutory bodies, either as a preferred or, quite often, the only choice of justice. They are convened to resolve local conflicts in a restorative rather than retributive manner, i.e. “seeking to promote communal harmony [...] rather than focusing on individual rights”.⁵² In other words, through its pronounced interventionist role, the traditional dispute resolution mechanisms can exert pressure on a dispute party to settle for less than the full entitlement, in the interest of the “common good”.⁵³

Unlike the statutory justice sector, the traditional justice sector has exhibited easier accessibility, affordability, comprehensibility and legitimacy.⁵⁴ However, the traditional dispute resolution mechanisms suffer from significant flaws, some of which are similar to those of the statutory justice,⁵⁵ including:

- a. **Lack of qualifications and skills** – *Jirga/shura* decision-makers and mediators and *mullahs* are neither trained lawyers nor otherwise versed in interpreting applicable statutory law. Instead, they rely on prevailing customary law (applied differently in rural and urban areas) and questionable authorities based on their own, often flawed interpretation of *Shari’ah*.
- b. **Harmful traditional practices** – The restorative justice approach often contravenes applicable statutory and human rights law to the point of being extremely detrimental to women. Allowing *baad* (the

50 See e.g. Wiebke Lamer and Erin Foster, *Afghan Ethnic Groups: A Brief Investigation*, Civil-Military Fusion Centre, p. 1, available at: https://www.cimicweb.org/Documents/CFC%20AFG%20Social%20Well-being%20Archive/CFC_Afg_Monthly_Ethnic_Groups_Aug2011%20v1.pdf.

51 See Library of Congress - Federal Research Division, *Country Profile: Afghanistan*, August 2008, p. 6, available at: <http://lcweb2.loc.gov/frd/cs/profiles/Afghanistan.pdf>. See also Wiebke Lamer and Erin Foster, *ibid.*

52 Noah Coburn and John Dempsey, *op. cit.*, p. 3.

53 Conor Foley, *A Guide to Property Law in Afghanistan*, Second Edition, NRC Kabul 2011, p. 90.

54 See e.g. NRC, *Building Linkages*, *op. cit.*, p. 9; Ali Wardak, ‘Building a post-war justice system in Afghanistan’ in *Crime, Law and Social Change*, Kluwer Academic Publishers, 2004, p. 327.

55 USAID, *Field Study of Informal and Customary Justice in Afghanistan and Recommendations on Improving Access to Justice and Relations between Formal Courts and Informal Bodies*, June 2005, p. 9., available at: http://www.usip.org/sites/default/files/file/usaid_afghanistan.pdf.

practice of giving away girls to settle disputes) represents an example of such an approach,⁵⁶ directly conflicting with applicable statutory law that establishes *baad* as a form of violence against women.⁵⁷

- c. **Exclusion of women** – Traditional justice mechanisms have an all-male membership and are male-oriented in decision-making. The patriarchal “culture” aimed at restricting women within the domestic sphere is deep-rooted in the traditional sector, and will usually result in women not receiving a fair hearing or decision on a case.
- d. **Inconsistent decision-making** – Local practices and decision making are highly susceptible to socio-economic and political influences meaning that decisions will vary widely from region to region. This is often because of a lack of proper *Shari’ah* knowledge meaning that, where there are gaps, decisions are based on local custom rather than *Shari’ah*. Decisions are also not registered which means that there can be no process of scrutiny or monitoring for consistency of decision making.
- e. **Corruption** – There is an excessive susceptibility to local power-holders and warlords’ wealth or armed presence and an overall lack of accountability.⁵⁸

FORMALISING JIRGAS

The Civil Procedure Law already provides for the indirect incorporation of the traditional justice sector’s decisions into the statutory one through the assignment of conciliators who facilitate the parties’ settlement before and during the court procedure, followed by the official registration of the settlement agreement.⁵⁹ This mechanism is in practice however not used very frequently.

In 2009, a working group composed of state agencies, national and international organisations was formed under the auspices of the Ministry of Justice (MoJ) to draft a policy promoting more comprehensive linkages between the two justice sectors. In 2010, the incumbent Minister was supposed to sign the policy. However, the MoJ management changed and the new Minister proposed that the policy should be in the form of legislation, arguing that a policy would not be effective in Afghanistan (as in e.g. Land Policy approved in 2007 the implementation of which is overdue). A new working group was set up to draft the Conciliation Councils Law. After six months work on the draft, the law was withdrawn from the agenda of the MoJ’s Legislation Drafting Department (Taqneen), due to objections from, among others, the Ministry of Women’s Affairs (MoWA’s) and women activists. At present, there is neither the political will nor effective coordination between the authorities to pass the law.⁶⁰

56 See e.g. UNAMA and OHCHR, Harmful Traditional Practices and Implementation of the Law on Elimination of Violence against Women in Afghanistan, December 2010, pp. 11-12, available at: http://unama.unmissions.org/Portals/UNAMA/Publication/HTP%20REPORT_ENG.pdf.

57 See below on the Law on Elimination of Violence against Women (EVAW), Article 5.

58 See generally NRC, Building Linkages; Ali Wardak, State and Non-State Justice; USAID, *ibid*.

59 Articles 230-231 of the Civil Procedure Law, Official Gazette No 10, 22 August 1990.

60 Cf. Coburn, Noah, Informal Justice and the International Community in Afghanistan, USIP, 2013, pp. 21-22, available at: <http://www.usip.org/sites/default/files/PW84-Informal%20Justice%20and%20the%20International%20Community%20in%20Afghanistan.pdf>.

4

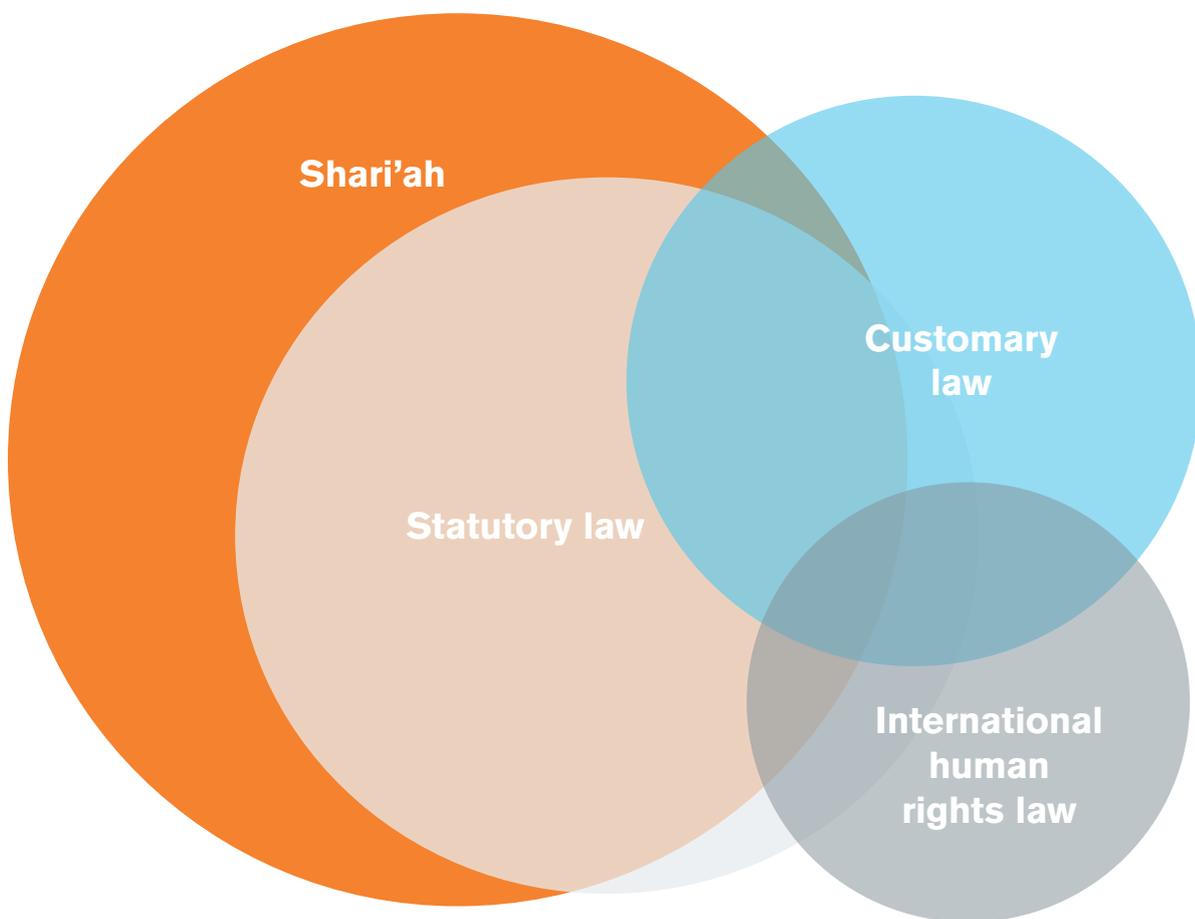


LEGAL FRAMEWORKS

OVERVIEW: RELATIONS AND HIERARCHY

The legal system in Afghanistan is composed of dissonant and competing legal frameworks, including statutory law, *Shari'ah*⁶¹ and local customary law. As a modern addition to the complexity of the existing legal pluralism, Afghanistan is also bound to apply international human rights law.

Figure 1: Relationship between applicable legal frameworks in Afghanistan



Statutory laws take precedence in the courts, while customary law prevails in *jirgas* and *shuras*. However, as mentioned above, in some instances where the court will make reference to *jirga*, and the decision pronounced by the *Jirga* is taken into consideration. This demonstrates a degree of positive co-operation between the justice sectors, but also the dangers of legalising possibly unfair *Jirga* outcomes. Both justice sectors apply *Shari'ah* as the fundamental basis for decision making, but customary codes of conduct exert a major influence on perceptions

61 The *Shari'ah* interpretation in this report is based on the official Hanafi school jurisprudence commented upon in Dr Wahabat U Zahili, *Al Fiqh Islami wa Addillah* (Arabic original), 11 volumes, Maktaba Rashidia, on file with NRC.

of right and wrong – often highly diverging from the *Shari'ah* applied by the state. While the government refuses to legalise or otherwise officially recognise any customary norms that contravene the statutory law, or outside the context of the above mentioned settlement facilitation capacities of *jirgas* and *shuras*, officials in rural areas often find it the best way to deal with their local problems. On the other hand, communities employing customary law use the threat of going to the state courts as a way to put pressure on reluctant disputants to accept their decisions.⁶²

Apart from the statutory-versus-customary law debate, the implementation of international human rights law represents yet another challenge in the context of Afghan legal pluralism. The Constitution of Afghanistan, as the country's supreme law, calls upon and guarantees a variety of human rights and sets institutional frameworks for their protection.⁶³ However, the constitutional protection of human rights is somewhat weakened by a number of inherent contradictions between relevant provisions⁶⁴ and the lack of clear and effective mechanisms to address the contradictions.⁶⁵ Practically, if a woman relied upon the constitutional guarantee of equal rights for both men and women before the courts in a case brought against discriminatory legal provisions governing women's access to inheritance, the claim is more likely to fail or remain in an institutional limbo.⁶⁶ It has been observed that any attempt to enforce secular statutory laws which depart from customary and/or particular interpretations of *Shari'ah* could result in "protests and perhaps even civil unrest".⁶⁷

62 Thomas Barfield, *op. cit.*, p. 353.

63 See specifically Preamble and articles 6, 7, 22-59 of the Constitution.

64 The Constitution establishes Islam as the state religion (Article 2), prohibits any law's contradiction to Islam (Article 3) and ensures that the provisions of adherence to *Shari'ah* cannot be amended (Article 149). The articles imply reservations that run against the nature of human rights law guaranteed in the Constitution (e.g. Article 22 on non-discrimination, including between men and women) and the related obligations of the country under applicable international human rights law instruments (Article 7). See e.g. Mir Hermatullah Sadat, 'The Implementation of Constitutional Human Rights in Afghanistan', Human Rights Brief, Vol. 11, No 3, 2004, pp. 2-3, available at: <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1379&context=hrbrief>.

65 Resolution of the normative clashes within the Constitution is especially challenging as Afghanistan has got multiple bodies claiming powers of constitutional interpretation (including the Supreme Court per Article 121 and the Commission for Supervision of the Implementation of the Constitution (ICSIC) established pursuant to Article 157). There have been no constitutional amendments passed to tackle the problem. See e.g. Tom Ginsburg, *Comparative Constitutional Review*, USIP memo, 2011, pp. 6-7, available at: http://www.usip.org/sites/default/files/ROL/TG_Memo_on_Constitutional_Review%20for%202011_v4.pdf.

66 The Supreme Court's approach in addressing some of the (similar) contradictions has been highly restrictive, i.e. oriented significantly towards *Shari'ah*, rather than human rights. See e.g. Mir Hermatullah Sadat, *op. cit.*, p. 3.

67 Martin Lau, *op. cit.*, para 10.

The complexity of the relations between the legal frameworks can be seen from the following provisions:⁶⁸

HIERARCHY OF LAWS

Article 3 of the Constitution⁶⁹:

In Afghanistan, no law can be contrary to the beliefs and provisions of the sacred religion of Islam.

Article 7 of the Constitution:

The state shall abide by the UN charter, international treaties, international conventions that Afghanistan has signed [ratified] and the Universal Declaration of Human Rights.

Article 130 of the Constitution:

While processing the cases, the courts apply the provision of this Constitution and other laws.

When there is no provision in the Constitution or other laws regarding ruling on an issue, the courts' decisions shall be within the limits of this Constitution in accord with the Hanafi jurisprudence and in a way to serve justice in the best possible manner.

Article 131 of the Constitution:

Courts shall apply Shia school of law in cases dealing with personal matters involving the followers of Shia Sect in accordance with the provisions of law.

In other cases if no clarification by this constitution and other laws exist and both sides of the case are followers of the Shia Sect, courts will resolve the matter according to the laws of this Sect.

Article 1 of the Civil Law⁷⁰:

In cases where the law has a provision, the practice of religious jurisprudence is not permitted. [...]

In cases [where] the law has no provision, the court shall issue a verdict in accordance with the fundamental principles of Hanafi jurisprudence of Islamic Shari'ah to secure justice in the best possible way.

Article 2 of the Civil Law:

Where there is no provision in the law or in the fundamental principles of the Hanafi jurisprudence of Islamic Shari'ah, the court issues a verdict in accordance with the public convention, provided that the convention does not contradict the provisions of the law or principles of justice.

68 All provisions are taken from publicly available official translations of the related legal instruments, with retained original formatting of the translated text, and verified for authenticity by NRC's legal counsellors.

69 Adopted on 4 January and promulgated on 25 January 2004.

70 Civil Law of the Republic of Afghanistan, Official Gazette No 353, 5 January 1977, available at: <http://www.asianlii.org/af/legis/laws/clotroacogn353p1977010513551015a650>.

INTERNATIONAL HUMAN RIGHTS LAW

Women's HLP rights are addressed and protected by a number of international human rights instruments, as well as specific platforms, applicable in Afghanistan. The most important of which are as follows:

1948 Universal Declaration of Human Rights (UDHR)

Article 17 of the UDHR⁷¹ provides that “everyone has the right to own property” individually or in association with others, while explicitly prohibiting the arbitrary deprivation of property. The provision is read in relation with Article 2 that proclaims everyone's entitlement to all UDHR rights and freedoms, “without distinction of any kind, such as [...] sex” and irrespective of the country or territory the person belongs. Article 25 further proclaims the right to an “adequate standard of living”, including the right to adequate housing and the right to security in the event of, unemployment, widowhood or other lack of livelihood. UDHR provisions are mirrored in all subsequently introduced human rights instruments. Despite its declaratory and apparent unbinding nature, due to its authority, the UDHR has acquired the binding nature of either “general principles of law” or customary international law,⁷² thus being fully applicable in the context of women's HLP rights in Afghanistan.

1966 International Covenant on Economic, Social and Cultural Rights (ICESCR)

Article 11.1 of the ICESCR⁷³ recognises the right to an adequate standard of living, including housing. The state parties are obliged to undertake all steps “to the maximum of its available resources” to progressively achieve the full realisation of the rights (Article 1.1), without discrimination (including as to sex; Article 2.2) and ensuring the equal right of men and women to all ICESCR rights (Article 3). The right to adequate housing incorporates protection against arbitrary/forced evictions, notwithstanding the type of tenure,⁷⁴ with extra protection against discrimination based on women's particular vulnerabilities “given the extent of statutory and other forms of discrimination which often apply in relation to property rights (including home ownership) or rights of

71 UN General Assembly (GA) Resolution 217A(III), 1948, UN Doc.A/RES/3/217/A (Third session, 10 December 1948), available at <http://www.un-documents.net/a3r217a.htm> and <http://www.ohchr.org/EN/ProfessionalInterest/Pages/ICESCR.aspx>.

72 See e.g. Clare Ovey and Robin C.A. White, Jacobs & White, *European Convention on Human Rights* (2002 Oxford University Press), p. 3.

73 UNGA Resolution 2200 A (XXI), 1966, UN Doc. A/RES/21/2200 (Twenty-first session, 16 December 1966), available at: <http://www.un-documents.net/a21r2200.htm>.

74 Committee on Economic, Social and Cultural Rights (CESCR), General Comment 4: The right to adequate housing (Art. 11(1)), 13 December 1991, para. 8, available at: <http://www.unhchr.ch/tbs/doc.nsf/0/469f4d91a9378221c12563ed0053547e>.

access to property or accommodation".⁷⁵ The ICESCR has been binding on Afghanistan since the country's accession to the instrument on 24 January 1983.

1966 International Covenant on Civil and Political Rights (ICCPR)

While the ICCPR⁷⁶ does not explicitly codify HLP rights, Article 17 does provide protection against arbitrary or unlawful interference with privacy, family and home. Similarly to the ICESCR, the state must ensure that the right is enjoyed without distinction of any kind (Article 2.1) and in accordance with the principle of equality of rights between men and women (Article 3). In relation to the latter, the ICCPR guarantees to everyone the right to recognition as a person before the law (Article 16), and the Human Rights Committee has clarified that "the capacity of women to own property, to enter into a contract [...] may not be restricted" based on marital or any other status.⁷⁷ Furthermore, states must also ensure full equality of spousal rights and responsibilities (Article 23.4), including those regarding "ownership or administration of property, whether common property or property in sole ownership of either spouse".⁷⁸ Apart from the prohibition of discrimination with regard to the ICCPR-guaranteed rights, states are also obliged to ensure equality and protection before the law even with regards to the rights outside ICCPR (Article 26), i.e. including any property rights guarantees made in other instruments. Unlike the ICESCR, the realisation of ICCPR rights should be immediate – not progressive (or dependent on available resources). The ICCPR has been binding since Afghanistan's accession to it on 24 January 1983.

1979 Convention on the Elimination of Discrimination Against Women (CEDAW)

The CEDAW⁷⁹ contains a number of very explicit guarantees of women's HLP rights. Article 15 imposes on the state party the obligation to ensure equality before the law, equal opportunities and identical legal capacity of women and men. In particular, women are awarded equal rights "to conclude contracts and administer property" and to be treated "equally in all stages of procedure in courts and tribunals" (para 2.). The article further sets out that "all contracts and all other private instruments of any

75 CESCR, General Comment 7: The right to adequate housing (art. 11.1 of the Covenant): forced evictions, 20 May 1997, para. 10, available at: <http://www.unhcr.ch/tbs/doc.nsf/0/959f71e476284596802564c3005d8d50?Opendocument>.

76 UNGA Resolution 2200 A (XXI), op. cit., and <http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>.

77 Human Rights Committee (HRC), General Comment 28: Equality of rights between men and women (article 3), UN Doc. CCPR/C/21/Rev.1/Add.10 (2000), para. 19, available at: <http://www1.umn.edu/humanrts/gencomm/hrcom28.htm>.

78 Ibid., para. 25.

79 UNGA Resolution 34/180, 1979, UN Doc. A/RES/34/180 (Thirty-fourth session, 18 December 1979), available at: <http://www.un-documents.net/a34r180.htm> and <http://www.un.org/womenwatch/daw/cedaw>.

kind with a legal effect which is directed at restricting the legal capacity of women shall be deemed null and void” (para. 3). Article 16 obliges the state to “take appropriate measures” to eliminate discrimination against women and “ensure the same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property whether free of charge or for a valuable consideration” (para. 1(h)), with specific focus on marital property and inheritance.⁸⁰ The CEDAW also contains protection pertaining to rural women’s livelihood needs, including equal treatment in land reform programmes and adequate housing, as well as guarantees on access to economic resources like financial credits (Article 13). Apart from the HLP-specific provisions, the CEDAW directly obliges the state to “modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women” (Article 5(a)). While Afghanistan signed CEDAW as early as 1980, the instrument became binding upon its ratification on 5 March 2003.

2000 UN Millennium Declaration

The Declaration⁸¹ sets out eight development goals (MGDs) to be achieved by the signatories by 2015. While it does not explicitly tackle women’s HLP rights, it could be broadly implied through the third goal which is “to promote gender equality and the empowerment of women as effective ways to combat poverty, hunger and disease and to stimulate development that is truly sustainable.”⁸² Afghanistan signed the Declaration in 2004, with all targets to be achieved by 2020.

Islamic human rights law

Notwithstanding numerous controversies as to its universality and human rights nature,⁸³ the 1981 Islamic Universal Declaration of Human Rights (IUDHR)⁸⁴ provides that “[e]very person is entitled to own property individually or in association with others” (Article XIV(c)), while the property cannot be expropriated except in the public interest and for fair and adequate compensation (Article XVI). With specific regard to the rights of married women, Article XX(c) upholds the right to “inherit from her

80 See particularly CEDAW Committee, General Recommendation No 21 on Equality in Marriage and Family Relations (Thirteenth session, 1994), paras 25-35, available at: <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm>.

81 UNGA Resolution 55/2, 2000, UN Doc.A/RES/55/2 (Fifty-fifth session, 18 September 2000), available at: <http://www.un.org/millennium/declaration/ares552e.htm>.

82 Ibid., para 20.

83 See e.g. Centre for Inquiry, Islam and Human Rights: Defending Universality and the United Nations, September 2008, available at: http://www.centerforinquiry.net/uploads/attachments/ISLAM_AND_HUMAN_RIGHTS.pdf.

84 Adopted by the Islamic Council (London-based affiliate of the Muslim World League NGO seated in Saudi Arabia), 19 September 1981, available at: <http://www.alhewar.com/ISLAMDECL.html>.

husband, her parents, her children and other relatives according to [*Shari'ah*]."

Using more secular language, yet with a similarly controversial approach to human rights, the 1990 Cairo Declaration on Human Rights in Islam (CDHRI)⁸⁵ similarly provides protection of a person's "right to own property acquired in a legitimate way" and prohibition of arbitrary expropriation (Article 15). It also guarantees the person's right to security and privacy "in his home, among his family, with regard to his property" and for the inviolability of private residence (articles 18). CDHRI is intended to serve as a guide for member states of the Organisation of the Islamic Conference (OIC), including Afghanistan.

Both these explicitly *Shari'ah*-based declarations are limited in their practical impact due to issues including ambiguity in specifying what constitutes *Shari'ah* given the differences in opinions between the more liberal *Hanafi* (applicable in Afghanistan) and other *madhhabs* (schools)⁸⁶ – especially on the specifics of women's HLP rights.

NATIONAL LAW

4.3

In theory, the Afghan legal system guarantees the rights of Afghan women to acquire, hold, use, administer and dispose of land and property. The main legal guarantees of women's HLP rights stem from both *Shari'ah* and the *Shari'ah*-based statutory laws influenced, to an extent, by international human rights law.

Shari'ah regards the individuality of women as an important principle and approaches them directly, rather than through male proxies, giving women the legal right to enjoy their property rights independently from their father or husband.⁸⁷ *Shari'ah* provisions regarding women's HLP rights are distributed across inter-related fields of family, property, labour and public law.⁸⁸ In Afghanistan, there is no separate, comprehensive statutory law governing all aspects of property issues, including that of (displaced) women. Land registration, administration and management is regulated by diverse legal documents, including the Constitution, Civil Law and over 30 land-related laws, presidential decrees, orders and policies.⁸⁹

85 Adopted by the Organization of the Islamic Conference (OIC), 05 August 1990, available at: <http://www.oic-oci.org/english/article/human.htm>. Note that CDHRI was published by the Office of the High Commissioner for Human Rights (OHCHR) as a regional instrument, in its Human Rights: A Compilation of International Instruments Volume II: Regional Instruments (December 1997), raising concerns as to OHCHR's failure to recognise it as a purely religious instrument as OIC is not a regional organisation, while CDHRI is not universal in its scope.

86 See Glossary section.

87 See NRC, A Guide to Property Law, op. cit., p. 89.

88 See Siraj Sait and Hilary Lim, Islam, Land and Property Research Series – Paper 5: Muslim Women and Property, UN-Habitat, 2005, p. 11, available at: ww2.unhabitat.org/programmes/landtenure/documents/ILP%205.doc.

89 E.g. Land Management Law (Law on Managing Land Affairs), Official Gazette No 958, 31 July 2008; Land Expropriation Law (Land Acquisition Law), Official Gazette No 795, 2000 (amendments in 2005, 2010), Presidential Decree 83 on Properties, Official Gazette No 816, 2003; National Land Policy adopted by the Cabinet of Ministers on 3 September 2007 etc.

With specific regard to IDP women and their HLP rights, the National IDP policy provides that:

“ [w]omen, including widows, shall be assisted in claiming their inheritance or access to their mahr (dowry) and, where necessary, they shall get free legal assistance to recover their [HLP] or get compensation for [HLP] that has been destroyed or damaged ” (Article 7.1.9(d))⁹⁰

The constitutional guarantee of women’s HLP rights is in line with the applicable international human rights law and specific provisions of *Shari’ah*:

CONSTITUTION	SHARI’AH ⁹¹
<p>Article 40 – on <i>property</i>:</p> <p>Property is immune from invasion.</p> <p>No person shall be forbidden from acquiring and making use of a property except within the limits of law.</p> <p>Nobody’s property shall be confiscated without the provisions of law and the order of an authorised court.</p>	<p>Qur’an 4:4 – on <i>mahr</i>:⁹²</p> <p>And give the women (on marriage) their dower as a free gift; but if they, of their own good pleasure, remit any part of it to you, Take it and enjoy it with right good cheer.</p> <p>Qur’an 4:7 – on <i>inheritance</i>:⁹³</p> <p>From what is left by parents and those nearest related there is a share for men and a share for women, whether the property be small or large,-a determinate share.</p>
<p>Article 22 – on <i>non-discrimination</i>:⁹⁴</p> <p>Any kind of discrimination and privilege between the citizens of Afghanistan are prohibited.</p> <p>The citizens of Afghanistan – whether man or woman – have equal rights and duties before the law.</p>	<p>Qur’an 4:32– on <i>property security</i>:⁹⁵</p> <p>And in no wise [ways] covet those things in which Allah Hath bestowed His gifts More freely on some of you than on others: To men is allotted what they earn, and to women what they earn: But ask Allah of His bounty. For Allah hath full knowledge of all things.</p>

90 National Policy on Internally Displaced Persons, The Government of the Islamic Republic of Afghanistan, Ministry of Refugees and Repatriation, adopted on 25 November 2013, on file with NRC.

91 For Shari’ah provisions on guaranteed equality between men and women, see e.g. Qur’an (An-Nisa’) 4:1, 4:124, (An-Nahl) 16:97, (Al-Ghafir) 40:40, (Al-Hujurat) 49:13.

92 Surah 4 (An-Nisa’ – Women), verse 4. Abdullah Yusuf Ali, An English interpretation of the Holy Qur’an, available at: <http://www.islam101.com/quran/yusufAli>.

93 Surah 4 (An-Nisa’ – Women), verse 7. Ibid.

94 For policy and strategic legal frameworks on equality between men and women, see e.g. Agreement on Provisional Arrangements in Afghanistan Pending the Re-establishment of Permanent Government Institutions (“Bonn Agreement”), December 2001, articles III.A.3, IV.2, V.4; Declaration of the Essential Rights of Afghan Women, June 2000, signed by Afghanistan in January 2002; The London Conference on Afghanistan (“Afghanistan Compact”), February 2006, cooperation principle 5; National Action Plan for the Women of Afghanistan 2008-2018 (NAPWA), 2008, Pillar 2 on Governance, Rule of Law and Human Rights; Afghanistan National Development Strategy 2008-2013 (ANDS), 2008, Chapter 8, p. 147.

95 Surah 4 (An-Nisa’ – Women), verse 32. Abdullah Yusuf Ali, op. cit.

Inheritance

Inheritance rules are a central component of *Shari'ah* and one of “the enduring legacies of classical Islamic law”.⁹⁶ *Shari'ah* never upheld the principle of primogeniture, which provides that only the eldest male child inherits real property, and is used to secure patriarchal social structures and ensure that the land stays within the family.⁹⁷ While women's rights to inherit family property were “sometimes honoured in the breach”, they endured the centuries-long challenges of Islamic legal discourse, ensuring a solid foundation for women's acquisition of property.⁹⁸ However, the legal standing of women with regard to inheritance rights is not devoid of flaws.

Afghan statutory inheritance norms are identical to the *Shari'ah* – especially as to the determination of shares according to gender and degree of relation. The Civil Law is very detailed in this regard, with an entire chapter dedicated to it.⁹⁹

The following table details the main legal provisions on women's HLP rights related to inheritance:

CIVIL LAW	QUR'AN ¹⁰⁰
<p>Article 90: A complete and binding marriage shall create all the rights and obligations for the spouses such as maintenance of wife, right to inheritance, obligation to prove [...]lineage and to avoid prohibited acts.</p>	<p>4:11: Allah (thus) directs you as regards your Children's (Inheritance): to the male, a portion equal to that of two females: if only daughters, two or more, their share is two-thirds of the inheritance; if only one, her share is a half. For parents, a sixth share of the inheritance to each, if the deceased left children; if no children, and the parents are the (only) heirs, the mother has a third; if the deceased Left brothers (or sisters) the mother has a sixth. (The distribution in all cases ('s) after the payment of legacies and debts. Ye know not whether your parents or your children are nearest to you in benefit. These are settled portions ordained by Allah. And Allah is All-knowing, All-wise.</p>
<p>Article 209: Where the husband during a fatal illness, grants his wife a distinct-divorce without her consent and then dies during the divorce period, the wife shall be entitled to inheritance and shall have to complete either the divorce period or the death period, whichever is longer.</p>	
<p>Article 367: (1) At the death of the endower, his children, husband or wife and parent shall be entitled to one-third of the property endowed provided their inheritance rights would not be repealed by any reason. Their rights shall be distributed according to the provisions of inheritance law; and in the event of their death, their rights shall be transferred to their heirs.</p>	

96 Siraj Sait and Hilary Lim, *Land, Law and Islam: Property Rights in the Muslim World*, Zed Books Ltd, New York, 2006, p. 107.

97 See pp. 139-140. See also NRC, *A Guide to Property Law*, p. 89.

98 Judith E. Tucker, *op. cit.*, p. 140.

99 See e.g. 4th Vol. articles 1993-2197.

100 Abdullah Yusuf Ali, *op.cit.* Cf. *all/alternative translations at <http://corpus.quran.com/translation.jsp?chapter=4>*

CIVIL LAW	QUR'AN ¹⁰⁰
<p>Article 1993: The ownership of movable and immovable property, and the rights left behind by the deceased shall be transferred to heirs in accordance with the rules, and the following proportions [¹⁰¹]</p>	<p>4:12: In what your wives leave, your share is a half, if they leave no child; but if they leave a child, ye get a fourth; after payment of legacies and debts. In what ye leave, their share is a fourth, if ye leave no child; but if ye leave a child, they get an eighth; after payment of legacies and debts. If the man or woman whose inheritance is in question, has left neither ascendants nor descendants, but has left a brother or a sister, each one of the two gets a sixth; but if more than two, they share in a third; after payment of legacies and debts; so that no loss is caused (to any one). Thus is it ordained by Allah and Allah is All-knowing, Most Forbearing.</p>
<p>Article 2002: Inheritance is based on marriage connection, and is in accordance with the shares fixed by Shari'ah, shares of relatives or both, or maternal relation or observation of rules of deprivation of inheritance.</p>	<p>4:176: They ask thee for a legal decision. Say: Allah directs (thus) about those who leave no descendants or ascendants as heirs. If it is a man that dies, leaving a sister but no child, she shall have half the inheritance: If (such a deceased was) a woman, who left no child, Her brother takes her inheritance: If there are two sisters, they shall have two-thirds of the inheritance (between them): if there are brothers and sisters, (they share), the male having twice the share of the female. Thus doth Allah make clear to you (His law), lest ye err. And Allah hath knowledge of all things.</p>
<p>Article 2008: Daughters in accordance with the provision of article 2009 of this law shall be entitled to inheritance as follows: 1 – One daughter shall be entitled to half of [...] patrimony; two or more shall be entitled to two thirds.</p>	
<p>Article 2009: Sister[s] in accordance with the provisions of articles 2091 and 2020 of this law shall be entitled to inheritance as follows: – One sister receives half and two or more shall receive two thirds of the patrimony.</p>	
<p>Article 2024: Impediment is that where a person has the capacity to inherit but due to existence of another inheritor does not become entitled to inheritance. The one prevented becomes a cause for hindering another inheritor to inherit.</p>	
<p>Article 2032: Sisters and brothers of the same parents or sister and brothers from father side or mother side shall be deprived of inheritance with the existence of father and grandfather, son and grandson even though their order is descending.</p>	
<p>Article 2137: [Bequest/] will entailing about a third of the patrimony to heirs [and] non-heirs is valid, and shall be enforced without the permission of the heirs; a will entailing more than [one] third of the patrimony is also valid, but enforcement thereof shall be pending on the permission of the heirs after the demise of the testator provided that the person granting leave enjoy the capacity to endow, and [he/she] in knowledge of what he has granted.</p>	

101 See the inheritance formula summarised below.

Shari'ah specifies two levels of heirs. Level-one heirs consist of primary or immediate ones: spouses, children, parents and son's children. Level-two heirs who are under special limitations include secondary heirs like grandparents, siblings, uncles, aunts, nephews and nieces. These do not qualify in all instances, with siblings only considered heirs in the event that the deceased dies without a father and son. A simplified summary, not comprehensive or conclusive, of women's inheritance scenarios can be summed up as follows:

INHERITANCE FORMULA

In the event of her husband's death, a **wife** is entitled to:

- 1/4 if her husband had no living children or male-line grandchildren¹⁰²
- 1/8 if her husband had living children or grandchildren

In the event of her father's death, a **daughter** is entitled to:

- 1/2 if she has no other siblings
- 2/3 if she has other female siblings (this portion is shared amongst the sisters)
- 2:1 ratio for sons-to-daughters if both exist

In the event of her children's death, a **mother** is entitled to:

- 1/6 if level-one descendants exist
- 1/3 if no siblings, father or spouse exists (but only children)
- 1/3 of the residue if siblings, father or spouse exist

What appears from the given provisions of law is that:

- The two main normative frameworks within the national law offer robust protection for Afghan women to access their inheritance.
- There are no limitations as to what type of property (immovable or movable) the majority of Afghan (*Sunni*) women can inherit.
- The law is very clear about the share that each female member of the family should receive and the inheritance share is inviolable.
- The paternal line of descendants is privileged.
- A 2:1 ratio exists between male and female children in terms of share of the inheritance.

Some exceptions exist with regard to the minority of Afghan *Shi'ah* women whose inheritance rights are separately and in detail regulated

¹⁰² Grandchildren include only son's descendants. The daughter's descendants are not considered heirs.

through the 2009 *Shiite Personal Status Law*¹⁰³. For example:

- ▶ Unlike the husband, the wife cannot inherit a significant portion of the spouse's immovable property. More specifically, “she does not inherit from the land and its proceeds, whether it is empty land [undeveloped], or land with buildings or trees on it or if it is used for agriculture [developed]; however, she inherits from the buildings, trees and other fixed assets on the land, and the heir of the husband can give the value of her portion to her” as well as “water of wells and other irrigation systems”.¹⁰⁴
- ▶ The wife in a temporary marriage (explicitly prohibited by *Sunnis*) may inherit from her husband if it is stipulated so in the marriage contract.¹⁰⁵
- ▶ In the case of divorce during the husband's illness, the wife can inherit even one year after the divorce date.¹⁰⁶
- ▶ Both maternal and paternal descendants can inherit (without privileging the paternal line).¹⁰⁷
- ▶ Apart from the legal inheritance share, legal heirs can benefit from the bequeathed (1/3 of total) property.

DISCRIMINATORY 2:1 RATIO – “COMPENSATION” ARGUMENT

The 2:1 ratio between male and female children has fuelled debates as it has been considered as a blatant sign of inequality between men and women's rights within Shari'ah.

Opposing this view, scholars argue that one should adopt a “holistic perspective” on the system established by Shari'ah. They suggest that the right to inheritance should not be considered on its own, but as one component of a larger ensemble of rules that regulates women and men's property rights.

This doctrine called the “compensation argument” sees the smaller share of women as a compensation for the fact that men are required to provide for their household and pay for mahr, which are two obligations that do not exist for women.¹⁰⁸

Mahr

On the occasion of concluding a marriage, the husband is required to provide *mahr* to the wife. The women's right to *mahr* is protected by the 1971 *Law on Marriage*,¹⁰⁹ *Civil law*,¹¹⁰ and *Shari'ah*.

¹⁰³ Adopted in February 2009, available at: <http://www.refworld.org/docid/4a24ed5b2.html>. Courts are required to apply the law in dealing with personal matters of Shi'ah. Shi'ah are the only religious minority whose personal status is officially governed by a separate law (see Article 131 of the Constitution).

¹⁰⁴ *Ibid.*, Article 226(7)-(8). With specific regard to movable property, an exception is that only the oldest son inherits certain personal items of his father, including “clothing, sword, ring and copy of the Qur'an”. Judith E. Tucker, *op. cit.*, p. 140.

¹⁰⁵ *Ibid.*, Article 137.

¹⁰⁶ *Ibid.*, Article 226(4).

¹⁰⁷ *Ibid.*, Article 231.

¹⁰⁸ See e.g. Siraj Sait and Hilary Lim, *op. cit.*, pp. 134-135. See also Judith E. Tucker, *ibid.*, p. 161.

¹⁰⁹ Official Gazette No. 190, 08 August 1971, available at: <http://www.asianlii.org/af/legis/laws/lom1971ogn190p1971080813500517a383>.

¹¹⁰ The Civil Law commits a separate chapter (articles 98-114) and a wide range of additional provisions related to handling mahr issues.

Key relevant provisions within the statutory law are as follows:

DURING MARRIAGE	AFTER MARRIAGE
<p>Article 110 of the <i>Civil Law</i>:</p> <p>Marriage-portion shall be considered the property of the wife. She can exercise any ownership power over her marriage-portion.</p>	<p>Husband's death</p>
<p>Article 14 of the <i>Law on Marriage</i>:</p> <p>The bride's mahr shall be fixed at the contract meeting and defined in the marriage document. If the <i>mahr</i> is immovable goods, the four bounds of that <i>mahr</i> shall be registered in the marriage document.</p>	<p>Article 98 of the <i>Civil Law</i>:</p> <p>The payment of marriage portion shall become imperative with [copulation], full privacy between the couple and with the death of one of the spouses even though it may have taken place before the copulation or full privacy between the spouses.</p>
<p>Article 15 of the <i>Law on Marriage</i>:</p> <p>No one, including the relatives of the bride, may, for the purpose of marriage, ask or receive under any title any cash or goods from the groom or his relatives. If such an act is done, those who commit it shall be pursued and punished according to the provisions of law. The wedding shall be with simple clothes of the country.</p>	<p>Husband-initiated separation/divorce</p>
<p>Article 16 of the <i>Law on Marriage</i>:</p> <p><i>Mahr</i> is the right of the bride and must be paid to her. The immediate and deferred <i>mahr</i> must be defined in this marriage contract and according to the provisions of this law should be paid to the bride or her Shari'ah representative.</p>	<p>Article 105 of the <i>Civil Law</i>:</p> <p>If separation takes place before copulation of full privacy between the couple, the wife shall be entitled to half of the specified marriage-portion and in other cases she shall be entitled to half of the accustomed marriage-portion.</p>
<p>Article 17 of the <i>Law on Marriage</i>:</p> <p>After the marriage contract, the bride and bridegroom or their representatives shall acknowledge as well as the other documents and should be in duplicate. The <i>mahr</i> which is specified in the marriage certificate is not subject to tax.</p>	<p>Wife-initiated separation (khul)</p> <p>Article 106 of the <i>Civil Law</i>:</p> <p>If separation takes place upon the wife's request prior to copulation or full privacy, her marriage-portion shall be completely abolished.</p>
<p>Article 26 of the <i>Law on Marriage</i>:</p> <p>The bride may take the right of ownership of the property which is fixed as <i>mahr</i>.</p>	<p>Article 156 of the <i>Civil Law</i>:</p> <p>Deposal is the dissolution of the marriage contract in return of the property that the wife may offer to the husband.</p>
<p>Article 41 of the <i>Law on Marriage</i>:</p> <p>Any cases that are not foreseen by this law, the provisions of the Hanafi jurisprudence of Islamic <i>Shari'ah</i> will be applied in accordance with [...] the Constitution.</p>	<p>Article 158 of the <i>Civil Law</i>:</p> <p>The property accepted as the marriage-portion shall also be accepted as substitute for deposal.</p> <p>Article 162 of the <i>Civil Law</i>:</p> <p>If deposal takes place in return to a definite property other than the marriage-portion, the wife shall be bound to pay it. Any other claim arising from the marriage rights such as marriage-portion or alimony left unpaid from the [past] shall not be heard at the time of deposal.</p>

The following are the relevant *mahr*-related provisions within *Shari'ah*:

Qur'an 4:4:

And give the women (on marriage) their dower as a free gift; but if they, of their own good pleasure, remit any part of it to you, Take it and enjoy it with right good cheer.¹¹¹

Qur'an 4:24:

[...] So for whatever you enjoy [of marriage] from them, give them their due compensation as an obligation. And there is no blame upon you for what you mutually agree to beyond the obligation. [...]¹¹²



111 Abdullah Yusuf Ali, op. cit.

112 Sahih International interpretation of the verse, available at: <http://quran.com/4/20-27>. Cf. *ibid.*, 4:24.

Several points should be noted in the course of an analysis of *mahr* used in the Afghan context:

- ▶ The families of the wife and of the groom agree on the nature and on the amount of the *mahr* usually at the point of engagement and the agreed-upon details are specified in the marriage contract and certificate (*nekahkhat* and *nekahnama*).
- ▶ The husband may decide to pay the *mahr* to his wife on the night of the wedding (*mahr-e-mo'ajjal*) or later on during the marriage (*mahr-e-mowjal*), based upon the agreement between the two families.
- ▶ In the event of the death of the husband before conducting this duty, *mahr* is prioritised among the husband's debts.¹¹³

MAHR FINANCIAL VALUE

While the “[d]efficiency in the amount of marriage-portion fixed for the wife” or unlimited *mahr* represents a ground for **marriage annulment**,¹¹⁴ the very amount of the *mahr* is **not regulated** either by *Shari'ah* or in legislation. It is usually decided based on the socio-economic profile of both families (including the families' prior experiences in such situations) and locally prevalent customs. In the course of the wedding, the *mullah* performing the marriage ceremony asks the groom's father to determine the *mahr* value which is subsequently recorded in the marriage agreement.

There have been attempts to include specific provisions on the amount of *mahr* in a draft amendment of the Afghanistan's *Family Law*. Since 2011, the law has been blocked by the Ministry of Justice (MoJ) due to a number of inconsistencies with the *Civil Law*, leaving *mahr* value still open to tailored interpretations often used in asymmetric marriage negotiations.

The above-mentioned legislation guarantees that the bride and the bride only, is legally entitled to get the *mahr*, thereby asserting that the *mahr* is the exclusive property of the woman marrying.

It is mainly in the case of the death of the husband, separation or divorce that the issue of *mahr* is brought to court. In terms of divorce and separation, however, the law does not give equal rights to men and women. The right to divorce is available only to men,¹¹⁵ while women can ask for separation (*khul*) with the men's consent.¹¹⁶ Yet, while women are entitled to *mahr* if the husband initiates divorce or upon his death, their rights to *mahr* in case of separation are rather ambiguous. The law legitimises the fact that a woman should “pay”, including through the return of her *mahr*, to obtain the dissolution of her marriage.¹¹⁷ In any case, if the *mahr* has not already been given/paid by the moment of the

¹¹³ See Foley, *A guide to Property Law in Afghanistan*, p. 63.

¹¹⁴ Article 133(c) of the *Civil Law*.

¹¹⁵ Article 135, *ibid*. The only exception allowing a woman to divorce is if the option is included in the marriage contract. See articles 142-143, *ibid*.

¹¹⁶ Articles 156-175, *ibid*.

¹¹⁷ Articles 156 and 158, *ibid*.

separation, the wife asking for a separation loses the right.¹¹⁸ While the legislation seems to adopt a conservative position on women's rights to *mahr* in the case of *khul*, practitioners argue that if the separation is requested for a "legitimate cause" – including harm, impotency, lack of alimony¹¹⁹ and absence of the husband – a woman would be able to obtain a separation without losing her *mahr*.¹²⁰

KHUL (AND MAHR) RESTRICTIONS IN SHARI'AH

Both *Shari'ah* and the legislation agree that, when a **husband divorces** his wife, she is entitled to *mahr* – if the marriage is not consummated, she is entitled to half of it.

However, ***Shari'ah* is far more restrictive** – to the point of frequent *de facto* exclusion – when it comes to allowing *khul* (wife-initiated separation) and, indirectly, access to the delayed *mahr*. Therefore:

- ▶ If the husband is absent, the woman should **wait between 40 to 90 years** (depending on her circumstances) before getting a separation.
- ▶ If the husband fails to pay **alimony** (maintenance during marriage), the jurisprudence and practice diverge. According to the primary, religious interpretation (incorporated into the *Civil Law*), a husband is always obliged to provide for his wife (if he is not able to provide, he is not supposed to get married). A three-month period is granted to the husband to demonstrate that he is able to provide, if he still fails to do so the woman is entitled to a separation and her delayed *mahr*. According to another interpretation (arguably prevalent among customary authorities and not reliable) a man is only obliged to provide if he is able (e.g. a very poor husband cannot be held responsible for the failure to provide) and the wife should therefore **stay married**.

It is worth noting that the 2009-enacted *Law on Elimination of Violence against Women* (EVAW)¹²¹ offers further protection of women's HLP rights through the criminalisation of acts of denial/deprivation of inheritance and *mahr* or property acquisition in general, considering these a form of economic violence.

118 Article 162, *ibid*.

119 The term is used here to mean maintenance that the husband is obliged to provide to the wife during marriage.

120 Key informant interviews with NRC legal counselors and representatives of Women for Afghan Women (WfAW).

121 The EVAW law, drafted by Afghan civil society organisations and women activists, was enacted in August 2009 by a presidential decree while the parliament was in recess. The law criminalises 23 forms of VAW and introduces precise obligations for relevant ministries for VAW prevention and response. In May 2013, the Parliamentary Committee on Women, Human Rights and Civil Society sought and failed to effectuate the parliament's adoption of the law, as the conservative parliament considered it "un-Islamic". The status of the law remains unchanged, and the implementation patchy with only 6.5% of the reported cases having been processed by the judicial system, which highlights the lack of resources and capacity allocated as well as the lack of will. The text of the law is available at: www.saarcgenderinfobase.org/includes/showFile.php?id=85. The last progress report (UNAMA and OHCHR, *A Way to Go: An Update on Implementation of the Law on Elimination of Violence against Women in Afghanistan, December 2013*) is available at: http://unama.unmissions.org/Portals/UNAMA/Documents/UNAMA%20REPORT%20on%20EVAW%20LAW_8%20December%202013.pdf.

LAW ON ELIMINATION OF VIOLENCE AGAINST WOMEN

Article 5 – Instances of violence:

The commission of the following acts shall be deemed as violence against women: [...]

- 17. Dispossessing from inheritance
- 18. Refusing to pay the dowry[dower/mahr]
- 19. Prohibiting to access personal property [...]

Article 33 – Prevention from acquisition of inheritance:

A person, who prevents a woman from her inheritance, in addition to having to restore her legal share, he shall be sentenced to short term imprisonment not more than a month.

Article 34 – Refusing to pay the dowry [dower/mahr]:

A person who intentionally refrains from paying the dowry of his wife (both Mahre Mosama and Mahre Mesl), in addition to the payment of dowry and taking circumstances into consideration, he shall be sentenced to an imprisonment of not more than a month.

Article 35 – Prevention from acquisition of property:

A person, who takes over the property of a woman without her consent or prevents her from acquiring it, based on the circumstances he shall be sentenced to short term imprisonment not more than 3 months and the property shall be vested into her authority.

LINKS BETWEEN HLP AND VIOLENCE AGAINST WOMEN

Women's HLP rights in the context of Afghanistan cannot be taken in isolation from larger issues of country-wide violence against women (VAW). The two issues are closely intertwined as evidenced by the following:

Violence as a source of HLP cases: There is a very strong connection between violence and *mahr* cases, as most women ask for their *mahr* at the same time they ask for a separation from their husband. As separation is considered to be shameful, the women who ask for it often have no other choice to secure their own safety and the safety of their children. Requests for separation are therefore often filed to avoid domestic violence and abuse. Acknowledging this link is important because, if women lose their *mahr*, they end up being double victims – of domestic violence and of financial insecurity.

VAW as a consequence of HLP cases: Women risk violence following the resolution of HLP cases. A woman's victory in court can disrupt the social and familial order and this may lead her husband or family to use violence (psychological or physical) on her to give up on the court decision. The fact that close family members are very likely to be at the source of the denial of women's HLP rights reinforces the risk for women's safety following HLP cases.

5



**REALITIES
FROM THE
GROUND**

OVERVIEW: CASE PROFILE

The international human rights legal framework offers the highest standard of women's HLP rights, and the statutory law and *Shari'ah* in Afghanistan strongly affirm women's rights to property through inheritance and *mahr*. However, a number of actors play a crucial role in distorting the awareness, interpretation and implementation of the legal frameworks in the Afghan context.

It is clear that customary practices significantly undermine women's access to HLP rights, most notably in cases of inheritance and *mahr* – and weakens their chances for personal economic empowerment and overall social development. This is based on NRC's work providing legal assistance to beneficiaries across Afghanistan, which is illustrated by the table below providing profiles for the two case categories of inheritance and *mahr*.

INHERITANCE CASES PROFILE	MAHR CASES PROFILE
1,613 total registered cases (female and male) ¹²²	34 registered cases ¹²³
48% (774) female only cases	100% female cases
53% refugee-returnees (21% female) ¹²⁴ 34% total IDPs and IDP-returnees (17% female) 13% local residents and refugees (8% female)	35% refugee-returnees 47% IDPs and IDP-returnees 18% local residents
6% of the female cases from Balkh (the lowest) ¹²⁵ 33% of female cases from Kabul (the highest)	3% of cases from Balkh – the lowest 59% of cases from Kabul – the highest
71% married females 26% female heads of households (widows)	25% of female heads of households (divorced)
49% of cases successfully solved and implemented ¹²⁶	53% of cases successfully solved and implemented ¹²⁷

Women's willingness to pursue their rights is evidenced by the fact that nearly half of the registered inheritance cases are those of female clients. This

¹²² As noted in the methodology section, the NRC's database records contains all (1,613) inheritance cases registered from 2005 to 2013.

¹²³ Unlike inheritance, *mahr* cases started being recorded in the database only in 2012-2013.

¹²⁴ The percentages in this section are derived from the total number of registered cases (1613).

¹²⁵ The higher or lower registration does not imply that the inheritance issues are more or less (respectively) prevalent in the given areas. Rather, it is about geographically varying factors, including socio-cultural norms and access possibilities, that influence women's decisions to pursue their rights.

¹²⁶ There was no significant difference between genders with regard to resolution rate.

¹²⁷ 83% is the resolution rate for 2012 only. The 53% of resolved cases out of all (2012-2013) is due to still active status of the cases registered in 2013.

¹²⁸ There was no significant difference between genders with regard to court and *jirga* resolved cases.

¹²⁹ The figure relates only to female cases. 10% of male cases were solved through mediation.

¹³⁰ 425 days for closing cases as unsolved due to beneficiaries' explicit withdrawal from the procedure or loss of contact.

highlights the existence of need as well as effective gender-sensitive targeting and awareness raising strategies. The registration rate of both inheritance and *mahr* cases significantly varies across Afghanistan. Lower registration rates do not necessarily indicate a lower level of need, but rather a range of different prevailing economic, socio-cultural and institutional circumstances that influence a woman's decision to claim her rights. The same circumstances condition the choice of the adjudicating forum and the length of applicable procedures. The majority of cases are resolved through negotiations and compromise outside the court.

5.2

ECONOMIC ASPECTS

Women's ability and willingness to claim their inheritance and *mahr* highlight questions of women's economic autonomy and decision making power. Afghan women's legal status and decision making is linked to that of male relatives and they are unlikely to own land or housing or to otherwise have economic independence. When life changing events take place such as the death of her husband, male relative or a divorce, women's vulnerabilities are heightened and they face the prospect of extreme poverty due to a lack of education, employment and support. In these circumstances they have to demonstrate significant resilience to survive and look after their families, particularly in situations of displacement. It is then, when there is no alternative, that a woman's need for economic stability and autonomy forces her to claim what is often her sole economic asset – either her inheritance or her *mahr*.

Lack of financial independence

Confronting family and established tradition is a likely scenario for vulnerable displaced women and female heads of households, who don't have a social support network. In particular, 26 per cent of women who received NRC's legal assistance in inheritance cases were widows. This proportion is significantly higher than the national average and even the proportion of widows among the general IDP population (over 19 per cent) whose monthly income is 12 USD or 53 per cent below the poverty line.¹³¹ Claiming their HLP rights is often a last, desperate measure to ensure survival and make a livelihood.

As in inheritance cases, even though *mahr* is the right of a woman, the society dictates that a husband is responsible for looking after his wife. Since women are socio-culturally deprived of work opportunities or financial independence, men (as presumed providers of their wives' daily maintenance) often do not see why they should pay their wives the separate *mahr*. Following a similar logic, a large number of women do not claim their *mahr*. The trust in the husband and his family is implicit and goes unquestioned. However, a failure to look beyond the immediate and account for contingencies prevents many Afghan men from taking adequate measures to guarantee the economic security of their wives

¹³¹ See NRC/IDMC et al., *op. cit.*, pp. 23, 36 and 68.

and children if something were to happen to them. NRC case studies showed that women claim the right to *mahr* only when something goes wrong, e.g. in the event of separation, divorce or death of their husband. Similarly to inheritance cases, claiming *mahr* is not seen as a legitimate demand but rather as a last resort. Since it occurs in situations of extreme vulnerability, women are keen to reach settlements that will not further damage their position in their family and community, even if it means accepting solutions that are manifestly unfair to them or not receiving their full entitlement.

DESTITUTE WIDOW WITH CHILDREN STREET-BEGGARS DEPRIVED OF LAND AND LIVELIHOOD

EXAMPLE 1

The client is a 50-year-old woman a refugee-returnee who lived in Pakistan from 2001 until 2005. She is now a widow living in Kabul City. Her husband was one of four brothers. Before they were made refugees, the brothers had purchased and used together as common property a piece of land measuring 5 beswas (500 m²). While all of them had invested in the purchase of the land, they kept the deed on the name of only the oldest brother as a traditional token of respect. However, the oldest brother later refused to share the land with his younger brothers, taking full possession of the land himself.

Upon her husband's death in 2001, the client had no means of making a livelihood and no support from her husband's family. She hoped to obtain her inheritance in the form of a portion of the land invested in by her late husband, to maintain her four children two of whom were very young and the other two old enough to become street beggars. The client and her

children lacked adequate shelter and had no reliable income.

Upon NRC's initial intervention through meeting the defendant (the late husband's oldest brother) and other brothers and presenting the legal aspect of the situation, *jirga* was held with both parties and community elders. Since the deed was in the eldest brother's name, two witnesses were required for a challenge. The other brothers testified in favour of the client, demonstrating that the client's late husband had a right to the land, and the *jirga* confirmed this. The eldest brother preferred to pay her for her portion, instead of providing the piece of land and, upon the *jirga*'s determination of the price, the client obtained the compensation and was able to move on with her life.

In the situation of not having any documentary evidence and limited awareness of her rights, the client was considered lucky to have had: access to legal aid and benevolent (other) brothers-in-law

Submission to interests of others

Women face pressures and interventions from husbands or other controlling family members when they wish to claim their inheritance shares. Several stakeholders noted this as an increasing trend, confirmed by the overview of NRC's cases, and the issue seems to be a double-edge sword. On one hand the support from male family members may increase the chances of women having a fair process and receiving a favourable decision. This is usually the case where the husband plays a role of a quasi-legal proxy for his wife who is culturally restricted in her ability to travel and engage with the male-dominant justice system. On the other hand, an insistence that the woman claims her rights (even when she does not herself want to) might spark additional domestic pressures and abuse. Moreover, any resulting tension with her family may prevent the woman from later seeking the family's economic protection in the event of dire need (e.g. husband's death or separation/divorce). Furthermore, the legal and financial proceeds of such claims are often retained by the husband for his own interests with limited or no actual benefit for the woman.

Costs as a barrier to justice

In pursuing their rights, displaced women face a variety of costs, including transportation, legal and administrative fees, taxes and a range of "hidden" or informal dues that represent an entry barrier to reaching justice. Displaced women fighting for their rights are often in a situation of also fighting for a bare survival, with their and the livelihood of their children highly dependent on the outcome of the legal procedure.

If a woman decides to file a claim over her inheritance in the form of immovable property, the primary court with territorial jurisdiction over the case is the one where the property is located.¹³² For refugee-returnee and IDP women, this rule can prove particularly challenging. Investing time and money for themselves and, when necessary, their *mahrams* and witnesses, to travel back-and-forth between the competent court (as well as related governmental departments) and their place of residence is not an option for destitute women. This is even more so in cases when the competent court is located in an insecure area, which further impacts on the travel arrangement costs.

While transferring a case to a closer court is possible "when reasonable grounds arise" and as long as the original court has not yet started processing the case, it also means significantly delay as only the Supreme Court can rule on such a transfer.¹³³ Apart from the usual delays in the statutory system, the required investment of additional time (often 3-5 months) and resources for the Supreme Court to decide on the case transfer, adds yet another significant layer of complexity

¹³² Article 92 of the Civil Procedure Law.

¹³³ Article 24.4 of the Law on Organization and Jurisdiction of Courts of the Islamic Republic of Afghanistan, Official Gazette No 851, 21 May 2005, available at: http://supremecourt.gov.af/Content/Media/Documents/OG_0851_org_juris_english572011105435388553325325.pdf, in relation to Article 93 of the Civil Procedure Law.

to the process. The situation of women requesting *mahr* is similarly unfavourable as the court jurisdiction is determined by the residence of the defendant/husband,¹³⁴ despite the specific nature of *mahr* cases. However, for some provinces (most notably, Herat), as a result of NRC's advocacy, the Supreme Court has exceptionally allowed the transfer of women's family cases (including *mahr*) to a court other than the one with original jurisdiction, based on the women's place of residence.¹³⁵

REQUEST TO TRANSFER CASE TO ACCESSIBLE COURT – A SUCCESS AND A FAILURE

EXAMPLE 2 & 3

A 51-year-old refugee-returnee impoverished widow and mother of three children, living in Kabul since 2004, was unable to independently secure her inheritance after her husband's death because, amongst other things, the land in question, which was occupied by a third person, was located far away in Bamiyan. Lacking basic food and clothes for herself and her children, the client was initially compelled to travel back and forth between Kabul and Bamiyan. A one-way trip takes 8-9 hours, up to 15 USD per person and a lot of security risks. Despite all this, the client managed to gain, on her own, a favourable decision from the Bamiyan Primary Court. However, the defendant appealed and the client could not afford to continue participating in the process due to the high logistical costs and time constraints, as well as the psychological stress caused by the overall situation. NRC stepped in with a successful request to transfer the case to Kabul, after which the procedure became easier, resulting in another decision in the client's favour. Now, she leases the land out and the income generated provides security for the family.

A 51-year-old IDP low-income woman from Kunduz City, currently living in Baghlan, had initiated a court procedure claiming her inheritance share from the 5.6 hectares of land in a highly insecure area of Chardara district, 30 km away from Kunduz City. The defendants in the case were her powerful brothers who had repeatedly denied her rights. Due to the defendants' influence and despite the submitted evidence, the district court failed to do anything for 5 years. Her earlier request to the Supreme Court to transfer the case to the closer and safer Kunduz City was rejected on procedural grounds (the transfer to another court is not allowed if the hearing has commenced). Once the client was displaced to Baghlan (a 3-hour drive distance from Kunduz), she could not travel back and forth because of both high travel costs (around 11 USD for her and a mahram one-way travel) and insecurity. Before losing access to the area due to insecurity, NRC pushed the district court to activate the case, but the client could not attend the proceedings and the case has been temporarily dropped.

¹³⁴ Articles 81-82 of the Civil Procedure Law.

¹³⁵ See e.g. Supreme Court's Circular Note No 1776, 1 June 2011, stipulating that "the procedural authorities of Herat district level courts have been delegated to the Herat provincial court to deal with cases of those women living in Herat city while their cases fall under the jurisdiction of district-level courts."

Women as claimants in their HLP cases are obliged to pay court procedural costs such as an administrative fee for the drafting of the court petition and also lawyer's fees. Expenses increase the longer proceedings go on and the more applications are made. Professional lawyers usually charge either 100-200 USD for drafting one lawsuit or a court submission, a monthly fee (irrespective of the number and type of legal services provided during the time) or a percentage of the total subject property value. Eventually, where there is a negative decision, women also have to pay the 10, 15 or 20 per cent tax on the total value of the land or residential property (depending on whether the decision is made by the primary court, appeal court or the Supreme Court, respectively). These costs are exorbitant and highly de-motivating under the circumstances of the Afghan justice system and women's social standing. On top of this, there is a set of unavoidable "hidden", unofficial costs payable to the bureaucracy in the form of bribes.

Because of court delays and costs, women often make an alternative recourse to the traditional dispute mechanisms on the basis that it is free-of-charge. In practice, in order to be accepted, a certain amount of money has to be paid to *Jirga* members. The majority of displaced women are unable to pay even for that.

SOCIO-CULTURAL ASPECTS

For women in Afghanistan, claims to inheritance and *mahr* are not only issues of economic support and livelihood, but also a struggle to assert their socio-cultural position in society. A woman claiming her inheritance and *mahr* is asking to make her own decisions about matters that directly impact on her life – a right to autonomy that is uncommon for women in Afghanistan. However, existing socio-cultural norms are a powerful obstacle against this drive for autonomy, decision-making and empowerment.

Social stigma

Women claiming their rights are the exception rather than the norm. Even under economic exigencies, the majority of women will not claim their HLP rights. It is considered shameful if a woman resorts to *jirga* and the court, especially for personal issues. The decision to pursue their HLP rights can result in a high social cost, including ostracism from their extended family and potentially violence. The NRC-assisted women demonstrated that they were ready and determined to seek justice despite the potential consequences on their life. For many women, that is too high a price to pay. Seven of the 24 case studies reported the woman reaching a compromise (e.g. giving up her right to *mahr* or getting less than her due inheritance or not getting the land and/or house but money in *lieu*) either to retain custody of her children or to live peacefully with her family.

Compromises on inheritance settlements

“ There are an estimated 1 million Afghan widows. Their average age is 35, and 90 per cent of them have an average of four or more children. Without the protection of a husband, widows suffer from social exclusion in Afghanistan’s patriarchal society. Many widows have no choice but to become beggars.”¹³⁶

When a woman pursues her inheritance rights, she is making a claim against a member of her close or extended family – in the majority of NRC cases this is one or several brothers, step-brothers, brothers-in-law, step-sons or other male relatives. Given that Afghan women are not allowed to engage with persons outside their limited family circles, it is implicit that an inheritance claim will have an immediate and significant impact on her domestic and daily life. This is in terms of where she stays, who provides for her economically and who guarantees her safety – especially if it involves more than one family (due to polygamous marriages). When involved in an inheritance case, an Afghan woman will usually have to make a careful choice between claiming the entire inheritance or reaching a compromise over what is rightfully hers, in order to maintain peaceful and amicable relations with those she is claiming against – often her closest relatives.

Manipulations over *mahr*

According to NRC’s research, in cases of *mahr*, women are often subjected to various manipulative practices by the interested families. When a married woman with children claims her *mahr*, her husband and/or his family may use the *mahr* as a negotiating tool, asking the woman to forsake *mahr* in order to maintain peaceful family ties. Furthermore, there have been instances where a woman has been coerced into choosing between claiming her *mahr* and maintaining the custody of her children. In the following example, a woman who is financially unable to look after her children was compelled to forsake her *mahr* in return for the husband’s family support.

¹³⁶ Peter Graves, Review of IFAD Amendment Bill 2012, submission to Joint Standing Committee on Foreign Affairs, Defence and Trade, p. 2., available at: http://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=jfadt/ifad+bill+2012/subs/sub1.pdf. Cf. UN Women’s assertion about two million war widows in Afghanistan, available at: <https://www.unwomen-usnc.org/book/export/html/66>.

EXAMPLE 4

MAHR WAIVED FOR PEACE AND PROTECTION

The client is a 34-year-old refugee-returnee from Herat who left the country in 2007 due to insecurity and returned from Iran in 2011. She had three young daughters and lived with her husband's second wife and their children. The husband had died in 2002 leaving long-term unresolved inter-personal relations between his two families and related HLP wrangles.

The client eventually decided to re-marry and move out of the strained environment. However, the client's step-sons did not allow the client to take her daughters with her to the new home – primarily due to fears of losing the control over the inheritance portion that the daughters were entitled to but had no say about. They refused to give the client her own inheritance portion, claiming that by re-marrying she waived all her property rights.

After being referred to NRC by a local organisation, the client lodged a dual case of inheritance and unpaid *mahr*. The client sadly realised she could not file the petition for the custody of her daughters, as her new husband could not afford to take care of them all. After extensive negotiations, the step-sons agreed to give the client her inheritance share (in money and in land), but not her *mahr*. Relying on the client's weak financial situation, the step-sons argued that the client was not able to provide for her three daughters, given that her new husband was a poor labourer, and promised to take good care of the daughters instead, if she would give up her *mahr*. The client eventually decided to accept the arrangement – she got the inheritance, but gave up *mahr* in exchange for her daughters' decent upkeep.

Lack of awareness of rights

The lack of awareness of both Afghan men and women about women's HLP rights is astounding. This goes back to the issue of the existing legal pluralism with tribal and customary traditions overshadowing the rights of women guaranteed by the statutory law or even *Shari'ah*. NRC's cases demonstrate how a lack of awareness is one of the main roots of women's lack of access to their HLP rights. In a 2011 study, it was found that almost 40 per cent of the surveyed persons thought that women did not have the right to *mahr*, while 21 per cent women did not know what *mahr* was.¹³⁷ 55 per cent of men and 45 per cent of women thought that women did not have the right to inheritance.¹³⁸ This ignorance is especially pronounced in rural and remote areas and among the illiterate and uneducated.¹³⁹ Interestingly, in recent years, legal practitioners have noticed an increasing number of cases of *mahr* and inheritance brought to court by women aware of the rights guaranteed to them by the Afghan

¹³⁷ Women and Children Legal Research Foundation (WCLRF) and UN Women, *Women's Right to Heritage and Property: Research Report*, 2011, pp. 17-18, available at: <http://www.wclrf.org.af/wp-content/uploads/2013/09/Womens-access-to-inheritance-English-book.pdf>.

¹³⁸ *Ibid.*, p. 11.

¹³⁹ *Ibid.*, pp. 11, 17. Note that the illiteracy rate is above the national average for IDP women – 98% vs 88%. NRC, IDMC et al., *op.cit.*, p. 23.

law.¹⁴⁰ This improved level of awareness is at present very much limited to urban areas (especially Kabul) but it does signal an important correlation between the level of awareness and the number of women willing to fight for their HLP rights before a court.

CHANGED PERCEPTIONS ON WOMEN'S INHERITANCE RIGHTS – FROM IGNORANCE TO ACCEPTANCE

EXAMPLE 5

The client is a 38-year-old ethnic Uzbek from the small village of Baimaghli in Faryab. She was internally displaced in 2004 due to insecurity and harassment by armed Taliban and insurgents. After two years of experiencing harsh displacement conditions, the client returned to the village only to face both insecurity and a personal land inheritance challenge.

Her father who had passed away in 1992, had left more than 4 acres of land to the client, her two brothers and their mother. On her return the client discovered that the brothers had divided the land amongst themselves, without providing the client with her share. When she asked for her piece of land, her brothers replied that she had no right to it.

Upon learning from NRC about the full scope of her land rights, the client expressed the concern that her brothers were unaware of such legal and religious obligations and that the custom in the area was such that women were not granted land or other immoveable property.

Seeking support, the client and NRC approached the village leader to explain the problem and share the compelling legal arguments. Concerned about the woman's situation, the village leader set up a meeting with her brothers in order to facilitate her access to the land. NRC held an additional meeting with community elders and religious leaders in the area to raise awareness on the case and the rights at stake. Through the convened *jirga*, the brothers agreed to grant the inheritance portion to the client and to make a written record of the decision in order for it to be upheld by the local community leaders.

The client now has access to her inheritance, uses the land to sustain her livelihood, and experiences no issues with her brothers. The brothers insist that they did not act maliciously but out of ignorance and as a result of common misconceptions about women's inheritance rights, demonstrating the significance of awareness raising and advocacy on women's HLP issues.

Restricted movement

A woman requires representation in order to access both the statutory and traditional justice sectors and is therefore rarely able to approach it without male support. Travelling around the country is difficult for a woman in Afghanistan for a variety of reasons, including that she needs to have a *mahram* (male escort) to accompany her. That means mobilising at least two people for the several journeys required for court

¹⁴⁰ Key-informant interviews with Afghan for Afghan Women (AAW), NRC's legal counsellors and social women's rights activists.

procedures. This is especially the case for displaced women, who are a lot more likely to be widows or heads of their households than the rest of the population. Some of the case studies illustrate this issue with the women being unable to appear before a court, therefore significantly weakening their chances of obtaining a decision in their favour. The problem of access to the court has been flagged as one of the major obstacles they have to face in the daily management of their cases.

Detrimental customary practices

As noted, even literate women who are aware of their right to the *mahr* would only very rarely claim it during their marriage.¹⁴¹ This goes back to the primary function of the *mahr*, which is seen as a security for the woman in case she cannot rely on her husband for her livelihood. Only rarely would the *mahr-e-mo'ajjal* be paid to a woman at the beginning of the marriage. This makes the resolution of *mahr* cases upon separation more complicated as to the amount of money to be paid. Furthermore, there is a frequent confusion between *mahr* and the custom of the *jehezia* ("bride price"). Arguably, "[m]ahr does not seem to play its role in Afghan legal practice as other expenditure; *walwar* in Pashto (Dari: *shîrbahâ*, *toyâna*: Uzbeki: *qalin*) is paid instead. This is a sum of money (or a commodity) paid by the groom or his family to the head of the bride's household."¹⁴² The practice of *walwar/jehezia* was officially forbidden in 1978.¹⁴³ Yet, various stakeholders confirmed that the confusion between these two practices was still prevalent in most regions of Afghanistan, weakening significantly the possibility for women to get their *mahr*. When the "bride's price" is confused with *mahr*, it means that:

- Women cannot enjoy the benefit of the property on her own as it seems to belong to her family.
- Upon separation, death or divorce, it is a lot more difficult for the women to claim land or other property from their late/estranged husband's family.

In some cases the bride's family may (intentionally) confuse *mahr* with *jehezia*. In the example below, the bride's family's use of *mahr* for their own purposes results in the situation that the bride, once being let down by her husband, is similarly betrayed her own maternal family, leaving her without any material support in the aftermath of the failed marriage.

141 Key-informant interviews with NRC's legal counsellors.

142 Irene Schneider, "Recent developments in Afghan family law: Research Aspects" In ASIEN 104: 106-118, July 2007, p. 110.

143 Decree No 7, 1 October 1978.

GIVING UP *MAHR* TO RETAIN CUSTODY OF A CHILD

EXAMPLE 6

The client is a 23-year-old woman from a village in Samangan, who was displaced to an urban centre due to conflict. Her parents who had lost their livelihoods as farmers, arranged a forced marriage to a man she had not met before because of their poor financial situation and inability to provide for her. The *mahr* was stipulated at 4,000 USD but was not paid at the beginning of the marriage. Soon after the wedding, the client became the victim of regular domestic violence. Nevertheless, she stayed with the husband until their baby daughter accidentally got burned. The husband reacted by initiating a divorce, holding her responsible for the daughter's injuries.

In the course of the divorce proceedings, the client got in touch with NRC and requested her *mahr*. However, her parents were not interested in the divorce as her father had already spent a certain amount of the money that the client's husband had handed to him on the occasion of the marriage. Namely, while the client's *mahr* was set at 4,000 USD, a portion of it (1,700 USD) that was actually paid at the start of the marriage was understood as being a *jehezia* (from groom's family to the client's father). Having spent the *jehezia* amount,

the client's family could not repay the money to the husband. Conscious of the usually poor prospects for women to achieve their rights, the client initially attempted to continue living with her husband, exposing herself to worsening domestic violence.

To survive the vicious circle of financial dependency and violence, and only after being thoroughly advised by NRC about her separation rights and the financial implications, as well as her stand-alone *mahr* right, the client herself now pushed forward for the divorce. However, conscious of the *Shari'ah* rules that custody over children is given to the father when boys reach 7 years and girls reach 9 years, the client's husband used this factor to obtain an advantage in the negotiations. He offered the client custody of their daughter only when he had paid off the due *mahr* amount (after which the child would automatically go with him). The client considered this unacceptable and insisted on reaching an alternative compromise. Eventually, she gave up on her *mahr* in exchange for the permanent custody of her daughter and cut off relations with the former husband and his family.

Despite various legal provisions protecting women's right to inheritance, customs play strongly against women accessing this right, as it is very often considered "shameful" for a woman to ask for her inheritance, especially from her father's family. The 2011 study confirmed the reluctance of women to even ask for their rights, with 39 per cent of female respondents claiming that cultural norms prevented them from asking for or receiving their inheritance.¹⁴⁴

144 WCLRF and UN Women, op. cit., p. 14.

“ It is shameful for women to own land, according to Shari’ah ”
(defendant in a case pertaining to inheritance)

This is linked to the idea that once married, a woman does not belong to her family anymore and that inheritance would lead to a transfer of property to the husband’s family.¹⁴⁵ Also, asking for inheritance is considered very similar to begging, therefore bringing shame upon the husband, who is responsible for providing for his wife.¹⁴⁶ The stranglehold imposed by these customary beliefs and practices makes it very difficult – and often dangerous – for women to seek justice in the first place. Fighting against familial and customary behavioural norms means accepting the opprobrium of a society where custom-based community relations are crucial.

Cultural bias in the justice sectors

An important hurdle in the quest for justice for Afghan women is the fact that the traditional dispute resolution mechanisms are based on customary practices, some of which are directly discriminatory against women. The fact that women are not allowed to directly attend *jirgas* – during which decisions are made on their behalf and engaging their future – is telling enough. However, it should also be mentioned that field experience shows that the male elders of *jirgas* are often open to listening and willing to respond to the law without discrimination – as long as they are convinced it is *Shari’ah*.

While the Afghan legal system officially recognises only the facilitative/ conciliatory role of the traditional dispute resolution mechanisms in the context of settling civil proceedings, no court has the capacity to monitor independent decisions made by the *jirgas* and to check whether these are operating in accordance with national/statutory law. The statutory justice system is seen to provide more protection against discriminatory customary norms and practices thanks to the formally existing statutory legal framework and the guarantee of a judicial review. However, the difference between the statutory and the traditional dispute resolution systems should not be overestimated.

“ It is not because you have a building that it makes your system formal. ”
(K. Motely, a lawyer based in Kabul)

Human Rights Watch (HRW) has carried out an extensive investigation into the consequences for women’s rights of the “lack of knowledge about the law” and the bias of Afghan judges in the context of criminal justice, and concluded that it “creates a situation where women consistently

¹⁴⁵ An extreme view on the women’s status as a property (themselves) can be seen in Pashtunwali where a woman indeed inherits, but she is also the subject of inheritance upon her husband’s death, in which case she is transferred to male in-laws.

¹⁴⁶ Key stakeholders interviews.

find themselves at great disadvantage".¹⁴⁷ As confirmed by legal practitioners, the situation is the same in family and civil courts throughout the country, rendering women's access to HLP rights particularly difficult.

SUPPORTING TRADITIONAL JUSTICE: A DILEMMA

The absence of checks on the traditional dispute resolution mechanisms raises serious questions about the role of the international community and the form of consensus in place to support them. USAID is a good example of the **shift** in the international community's approach **towards traditional** justice. Between 2004 and 2009, USAID funding focused on building statutory justice institutions through the *Afghan Rule of Law Project*. However in the next phase, the 2010–2014 *Rule of Law Stabilisation Programme* focuses on "the traditional dispute resolution system" and "community-based dispute resolution mechanisms".

While this decision may be the only possible solution in a country with such complex legal plurality, the consequences of this choice for women's rights (including HLP) are not benign. Women's organisations and social activists have criticised the increasing international support towards traditional dispute resolution mechanisms on the basis that:

- ▶ It **diverts attention and funding** from the statutory system, which is in dire need of funding to reform in order to meet international standards;
- ▶ It **legitimises customs** which are often discriminatory – and sometimes violent – against women. NRC's case studies show that traditional dispute resolution prioritise a conciliatory compromise over respect for women's HLP rights;
- ▶ It indiscriminately **reinforces the power** and influence of a few local actors, regardless of their records in terms of equity or women's rights.

The current security situation in Afghanistan does not make the dilemma between a "more efficient" traditional justice and an allegedly corrupt and inefficient statutory system an easy one to resolve. It is of course important to have the ability to recourse to the traditional dispute mechanisms in cases of effective absence of the statutory justice system (prioritising possibly bad justice over no justice at all). However, international organisations (like NRC) and other stakeholders supporting Afghan justice system need to carefully **factor in the consequences** of relying increasingly on the traditional mechanisms for ensuring respect, protection and promotion of women's rights in Afghanistan.

INSTITUTIONAL ASPECTS

5.4

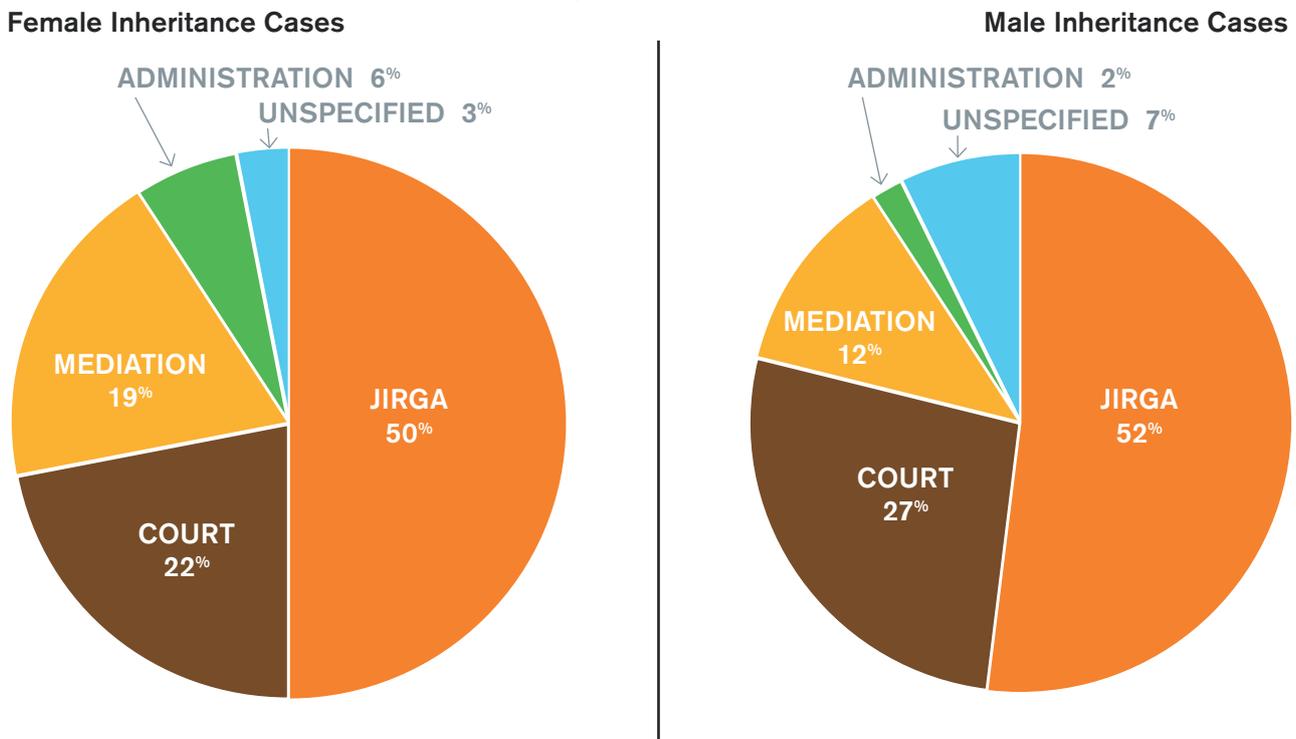
Few Afghan women have the autonomy and are able to muster the enormous willpower required to claim their inheritance and *mahr*, even in situations of necessity, in the face of immense social isolation. Even where there is the determination, women have lower chances of success if they are left without support. Therefore, the determining factor is establishing contact with organisations and institutions that can help them access their rights. Affected women usually approach such agencies through family, community members or directly after attending awareness raising programmes. Referrals are a key element of this system which assists a woman in negotiating the institutional landscape that can best address her claims. Inheritance cases are technically heard in the civil court

¹⁴⁷ Human Rights Watch (HRW), "I had to Run Away": The Imprisonment of Women and Girls for "Moral Crimes" in Afghanistan, 2012, p. 78, available at: http://www.hrw.org/sites/default/files/reports/afghanistan0312webwcover_0.pdf.

whilst *mahr* cases are heard in the family court. Even though the courts are theoretically meant to be different, depending on the case, limited judicial capacity in rural areas often means that the same court acts as the criminal, civil and family court.

For cases of both inheritance and *mahr*, a woman can either go to court (statutory system) or the local *jirgas*. The figure below, depicts an analysis from NRC's database that shows that both men and women choose (whether voluntarily or not) the traditional dispute resolution mechanisms, with 52 per cent and 50 per cent of inheritance cases, respectively, being resolved through *jirgas*. Court procedures and administrative procedures¹⁴⁸ are used to solve about a quarter of cases for both men and women.

Figure 2: Dispute resolution mechanisms used in 1,613 inheritance cases (774 female, 839 male)



While there are many similarities between male and female users of the justice systems, it is interesting to note that female inheritance cases were resolved through mediation significantly more than in male cases. Furthermore, 39 per cent of *mahr* cases are resolved through mediation, followed by court procedure (33 per cent) and *jirga* (28 per cent). This illustrates the priority given to compromises for female cases which are seen as more disruptive for the social and the community order. Qualitative analysis highlights that often a case involves both the statutory and traditional justice sectors, with the client first going

¹⁴⁸ In the Afghanistan dispute resolution process a civil dispute is first referred to the Civil Rights Department within the Ministry of Justice (commonly called the Hoqooq Department) for a process of formal mediation. Only when this mediation fails is the case referred to court. Therefore, the ICCLA programme separates cases resolved by the law department from those resolved by the courts (judiciary).

through either the *jirga* or the court and reverting to the other, if the case does not progress.

Lack of documentation

While it is difficult for any Afghan to make their way through the circumvolutions of the Afghan justice system, displaced women face specific obstacles that make it even harder for them to seek justice, especially when it comes to HLP rights. Displaced women often don't hold the necessary mandatory legal documents required to commence legal proceedings. Normally in cases of inheritance and *mahr*, the following three documents are deemed necessary:

- ▶ **Tazkera** (personal identification document): Only 18.2 per cent of the IDP women had *tazkeras*, as opposed to 83.4 per cent of the IDP men surveyed.¹⁴⁹ There is frequently only one *tazkera* per household and it is almost always under the name of the male head of household. This is a serious obstacle for displaced women trying to access their HLP rights as it is necessary to present an ID document to submit a case to the court. According to the *Law on Registration of Population Records*¹⁵⁰, in order for a woman to get her own *tazkera*, she has to go back to the place where the ID of her father (alternatively, her husband) was registered in the first place. This raises a number of practical concerns, including as to the security of the area, available finances and biased cultural perceptions on women's movement.

“ The big issue is the absence of marriage documentation. We should advocate for marriage registration to be made compulsory. There should be disincentives for those who do not have their marriage formally registered. It would greatly help women claiming their *mahr*. ”

(Programme Manager at Women for Afghan Women)

- ▶ **Marriage documents:** Beyond the issue of *tazkeras*, it is also difficult for displaced women to present written documents proving their rights to either *mahr* or inheritance. For example, *mahr* agreed upon between two families should be clearly stipulated in the marriage contract (*nekahkhat*) and in the registered marriage certificate (*nekahnama*). Yet, it is still highly uncommon for Afghans to officially register their marriages – there is either no specific reason to register or no awareness of the registration process and the potential benefits of it. Legal practitioners identified this absence of marriage documentation as one of the biggest challenges in respect of women's access to their *mahr*.
- ▶ **HLP documentation:** Documents proving ownership or tenure of land, housing or property are key in inheritance cases. Due to the complex and competing institutional and legal frameworks, there is a variety of types of documented land tenure in Afghanistan, including formal (court

149 See NRC, IDMC et al., op. cit., pp. 8, 41. As mentioned earlier, 1,000 IDPs were surveyed in 5 provinces (Faryab, Herat, Kabul, Kandahar and Nangarhar).

150 Adopted in 1955, available at: <http://www.asianlii.org/af/legis/laws/loropr1955426>.



and administrative), customary and religious. Around 55 per cent of Afghan households have access to land through ownership, farming based on renting, sharecropping or mortgaging arrangements.¹⁵¹ While it is often very hard for them to produce tangible proof of their land right after years of displacement,¹⁵² it is also more complicated for women to rely on the testimonies of people aware of their situation in areas which they left years ago and where they lack the support networks that other relatives might have kept intact. Registering the rights to a piece of land requires a written document and an official entry in the records of the land authority at the provincial and/or central level. However, these records are often out-dated or non-existent. Papers that show ownership of a specific piece of land are informal or are not registered and have to be taken at face value. There is often a conflict between the

151 ICON Institute, *National Risk and Vulnerability Assessment 2007/8: A Profile of Afghanistan – Main Report*, p. 41, available at: http://ec.europa.eu/europeaid/where/asia/documents/afgh_nrva_2007-08_full_report_en.pdf.

152 For example, a large number (44% in urban areas, 23 percent overall) of households “cannot prove the ownership of their dwelling by either inheritance, building the house, formal renting agreements or having a registered deed”. ICON Institute, *National Risk and Vulnerability Assessment 2007/8: A Profile of Afghanistan – Main Report*, p. 92, available at: http://ec.europa.eu/europeaid/where/asia/documents/afgh_nrva_2007-08_full_report_en.pdf.

formal land records and more informal documentary evidence. As the land registration process is long, drawn out and difficult, and fraught with taxes and corruption, many people do not opt for formal land registration. When they do choose formal registration, it is mostly in the name of the male head of household (husband or, in case of widows, sons). A survey carried out in 2004 found that, only 1.87 per cent of women owned land by themselves, i.e. in their own name.¹⁵³ There is currently no reliable data as to the extent of women's land ownership.

Lack of access to legal aid

Professional legal aid is essential in bridging the gap between the women and justice. A key observation based on NRC's case studies is that in none of the cases did a woman actively decide to claim her inheritance and *mahr* primarily because she had had direct knowledge about her rights and/or about NRC as a legal aid provider. The cases demonstrate that it is economic necessity which is the main driver for the woman to claim her rights, usually as a last resort.

There is also a general lack of awareness amongst women about the availability of legal aid. While many legal aid providers do maintain an outreach component in their programming, there are not enough resources to meet all needs, particularly to reach rural and isolated terrain of Afghanistan and address the women's information and visibility gaps. In all of the cases reviewed, women gained access to legal aid mainly through referrals, and with coordination and persistence. A number of them heard of legal aid only by chance. Relevant legal aid providers do not operate in a large portion of Afghan territory at either provincial, district or village level. For the women living in these and other insecure areas, the lack of professional and free-of-charge legal services renders their HLP rights virtually non-existent.

Failure to implement Decisions

The weakness of the enforcement mechanisms following judicial and administrative decisions represents one of the biggest flaws of the statutory justice sector, further reinforcing the importance of the generally accessible customary justice. The Police and the Law Department of the Ministry of Justice (MoJ) carry the responsibility and accountability for the enforcement of the decisions. Yet, in large parts of the country, governmental institutions have lost control and focus on maintaining security in provincial and district centres.

¹⁵³ Based on the sample of 360 surveyed households from Badakhshan, Faryab, Ghazni, Herat, Laghman and Saripul, where the majority of female owners were from Badakhshan. It should be noted that the Badakhshan women were owners even when they were a part of a male-headed households. Jo Grace and Adam Pain, *Rethinking Rural Livelihoods in Afghanistan*, Synthesis Paper Series, AREU, July 2004, p. 24, available at: <http://www.areu.org.af/Uploads/EditionPdfs/424E-Rethinking%20Rural%20Livelihoods%20SP.pdf>. Jo Grace, 'Who Owns the Farm? Rural Women's Access to Land and Livestock', Working Paper Series, AREU, February 2005, p. 16, available at: <http://www.areu.org.af/Uploads/EditionPdfs/503E-Who%20Owns%20the%20Farm-WP-print.pdf>. Cf. Thea Hilhorst and Nicholas Porchet, *Food Security and Land Governance Factsheet*, The Royal Tropical Institute KIT, p. 6, available at: <http://www.landgovernance.org/system/files/Afganistan%20Factsheet%20-%202012.pdf>.

“ The main problem is that even if you have a good outcome in the statutory court system: how do you implement it? How do you get the decision enforced? There are innumerable examples where people obtained the respect of their land rights but the decision is not enforced. [...] There is no administrative continuum to enforce decisions. This is a huge issue especially for those who are really powerless, like women.”

(a lawyer working in the statutory justice sector)

When it comes to women's HLP rights, the issue of enforcement is even more acute because their land issues are among the most complex to tackle. In cases involving evictions, in the context of the power-games of local actors, women are particularly disadvantaged. As noted by a Kabul-based lawyer, “[i]t is very difficult to force people off their land through the court system. A lot of people then revert to traditional dispute resolution mechanisms and even to vigilantism/violence.”

Tolerance of coercion and violence

Women face a risk of violence when they request the implementation of decisions made in their favour. This explains why the disputing parties usually resort to compromises (mainly, mediation) and why women are keen on accepting or forsaking some of their rights in return for a peaceful process and maintaining family harmony. NRC's cases show that many women preferred ensuring that they kept the good will of their brothers or family-in-law rather than going through a painful – and often dangerous – legal conflict with them.

Legal disputes over issues like *mahr* or inheritance can be as dangerous for women as criminal cases such as *zina* (adultery) where women's honour is seen as being at stake. The choice between upholding rights and a situation where a woman can continue living with her family (usually the people she has taken to the court) must be carefully considered in each case.

The mutual causal relationship between women's HLP rights claims (inheritance and *mahr*) and domestic/physical violence needs further exploration but feeling safe and secure in your home and having access to legal mechanisms to ensure women's safety is key to protecting against GBV. Yet neither the authorities nor aid providers are sufficiently aware of these linkages and, consequently, are not able to properly act upon them. For this reason, the landmark EAW law's effects as to criminalisation of economic violence remain very limited. Cases are rarely filed and when the perpetrators of such violence are prosecuted they are usually acquitted.¹⁵⁴ More specifically, cases involving denial of

¹⁵⁴ See e.g. UNAMA and OHCHR, *A Long Way to Go: Implementation of the Elimination of Violence against Women Law in Afghanistan*, November 2011, p. 11, available at: http://www.ohchr.org/Documents/Countries/AF/UNAMA_Nov2011.pdf.

women's inheritance, *mahr* and property rights are "often treated as civil law cases and resolved primarily through mediation or civil court"¹⁵⁵, despite their criminal nature under the EVAW law.

SEVERE VIOLENCE RESULTING FROM INHERITANCE AND MAHR CLAIMS

EXAMPLE 7 & 8

The client's father died in 2012, leaving a large portion of land as inheritance for his wife, 9 daughters and 2 sons. The male heirs claimed full ownership of the land and refused to share it with their sisters. When the client asked her brothers for her own share and the shares of her sisters, one of the brothers beat and killed the client's husband. No prosecution occurred due to bribes paid by the brothers. After again making a request to share the inheritance and it being rejected, the client filed a civil law petition to the law department and the competent primary court. As a result, the brother ambushed and severely physically assaulted the client's two sons with the intent to maim and kill both of them. One of the client's sons had his mouth torn up to his ear and the other had his nose cut off. They survived only thanks to the intervention of a nearby villager who fought off the assailants and took the boys to hospital. NRC referred the client to the criminal justice department and only after repeated requests to the Prosecutor to initiate the procedure, the assailant was put in jail. Again, due to his wealth and influence, the assailant is expected to walk free. In the meantime, while the civil legal (inheritance) case is still ongoing, the client has already considered withdrawing the claim, as her brother has threatened to kill her and her family as soon as he gets out of jail.

The client is an illiterate under-age girl forced by her father to get married to an older man. *Mahr* was set at 10,000 USD out of which 3,000 USD was paid at the beginning of the engagement. Upon the client's first visit to her fiancé's family, she was not allowed to return home, despite her fiancé's temporary absence from the country (he was a labourer in Iran). Upon his return, marriage was immediately arranged, without a proper wedding party and the provision of the remaining *mahr* amount. When the client requested the amount, the now-husband severely physically abused her. After the assault, she returned to her father. After referral to *jirga* by the initially-petitioned court, the girl's right was upheld. The husband conditioned the payment on her return to his home, promising he would not abuse her again. In a follow-up visit to their home (to formally close the case), the court found that the husband had not paid the *mahr* while he was (almost successfully) coercing the client to withdraw the court petition. Eventually, after the court's negative response due to the husband's influence and bribes, the client got her *mahr* as well as divorce (as a means of ending the physical abuse) through another *jirga* session.

¹⁵⁵ Ibid., note 87, p. 22. Cf. UNAMA and OHCHR, *A Way to Go: an Update* [...], December 2013, p. 15.

6



STAKEHOLDER IDENTIFICATION

The stakeholder landscape on the HLP rights of displaced women in Afghanistan is not sufficiently developed to address their needs. This is because addressing women's HLP issues requires a very specific expertise that only a few organisations have, as well as because HLP issues involving extremely valuable assets are an area of high sensitivity with accompanying risks. The majority of organisations work in the generic areas of HLP, displacement, women's empowerment and justice. The key question is whether there is any cross cutting activity between these areas and by those organisations that would encompass displaced women, justice and HLP together.

One of the main programmatic obstacles is the limited legal assistance capacity, due to security, logistical or resource constraints – especially in the areas of the country where women's access to their HLP rights is particularly challenging, such as the Pashtun areas of the South and Southeast.

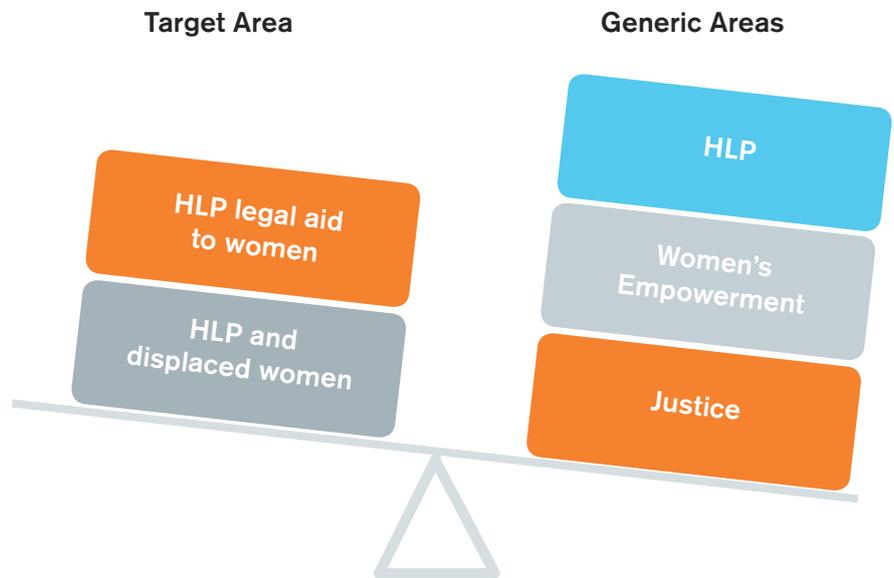
Once such programmes are rolled out, the challenge (as identified through stakeholders interviews) appears in terms of sources and forms of monitoring and evaluation. Legal assistance programmes' achievements largely tend to be evaluated through quantitative indicators including numbers of beneficiaries, numbers of cases solved/unsolved, type of justice sectors used etc. On the other hand, the HLP case histories of women who have claimed their HLP rights, are an excellent source of information feeding into qualitative analysis on the challenges faced and causal dynamics involved in claiming HLP rights. Women's access to HLP rights cannot be understood only by statistical information on resolved cases. A deeper insight is needed as to, among other things, the actual resolution outcome, decision implementation status and the overall sustainability of the provided solution.

With the multitude of different organisations' missions and mandates, another challenge is posed in trying to bridge the gap between the humanitarian and development actors and programmes to ensure an adequate transition. The current HLP Task Force operating under the Afghanistan Protection Cluster (APC) is a humanitarian coordination mechanism, but HLP issues often fall outside the scope of purely humanitarian action requiring a gradual shift to a development-oriented and government-led coordination forum.

OVERVIEW: FOCUS IMBALANCE

While a thorough stakeholder analysis is outside the scope of this study, it is necessary to obtain a brief overview of key actors engaged in providing HLP assistance to displaced women in Afghanistan. Within the relevant stakeholder landscape, a broad set of areas can be identified which have an indirect impact on the focus area of this study.

Figure 3: Imbalance of stakeholder coverage with reference to HLP and displaced women



“ Unfortunately, family law cases and women’s property rights are completely neglected ”
 (Human Rights Watch – HRW, Afghanistan)

Organisations working in generic areas such as justice, women’s empowerment and HLP outweigh organisations that are working on specific targeted areas such as HLP and displaced women and HLP and legal rights of women. There is a growing shift amongst donors as well, in terms of moving away from small on-the-ground projects, to providing holistic national-level support.

The purpose of highlighting this imbalance is to bring attention to what extent cross cutting activities within these generic areas encompass HLP rights of displaced women, even peripherally. Whilst criminal cases of domestic violence and rape find representation both within the government and international and national actors, civil cases pertaining to women’s access to inheritance and *mahr* are sidelined.

In conditions of growing insecurity, the complex nature of displacement in Afghanistan, a weak justice system and social constraints as well as declining funding, means that national and international actors dealing with HLP issues face a daunting challenge.

STAKEHOLDER IDENTIFICATION

The stakeholder landscape comprises government actors, international and national non-governmental organisations (NGOs), donor-run programs, UN Agencies, civil society and grassroots organisations. Within these are the specialised organisations that work on displacement and related issues, like UNHCR, NRC, Danish Refugee Council (DRC), International Rescue Committee (IRC) and other agencies and programmes that work on land issues, including USAID-supported Land Reform in Afghanistan (LARA). Added to these, legal aid sector organisations like the Legal Aid Organisation of Afghanistan (LAOA), Women for Afghan Women (WfAW), Humanitarian Assistance for the Women and Children of Afghanistan (HAWCA), Women and Children Legal Research Foundation (WCLRF), International Development Law Organisation (IDLO), International Legal Foundation and independent lawyers work towards providing legal aid to those who are unable to afford private lawyers, including displaced Afghan women.

Governmental actors

Within the ambit of HLP rights for displaced women, key government agencies include the Ministry of Refugees and Repatriation (MoRR); Ministry of Women's Affairs (MoWA); Ministry of Justice (MoJ); and Afghanistan Independent Land Authority (*Arazi*) – the land department of Afghanistan; along with their line departments in the provinces. At present, there is no coordination mechanism within these agencies that looks specifically at safeguarding the HLP rights of displaced women.

According to MoRR, a lack of awareness amongst women about MoRR competencies combined with the institution's lack of outreach capacity means that they are unable to directly provide legal aid to displaced women. Provincial departments of MoRR (DoRRs) refer cases to justice institutions on an *ad hoc* basis, seeing themselves more as coordinating bodies. In the event of a woman approaching a DoRR, they are able to provide her with a document that confirms her displacement status,¹⁵⁶ without further support possibilities to facilitate her access to rights. The woman approaching the institutions has to be accompanied by her husband, father or brothers. In cases of inheritance and *mahr*, these are often the same persons denying her rights. However, through being a part of the referral network, MoRR works closely with organisations like NRC and UNHCR providing assistance to displaced populations.

MoWA is a key actor to whom criminal cases of violence against women are referred. Bearing in mind the links highlighted in this report between HLP and VAW, it is critical to have organisations that can bridge the gap between civil and criminal cases. More generally, MoWA's greatest significance lies in the fact that it is the sole branch of the government that is dedicated to working with women in Afghanistan. Its networks and resources in the form of their department offices in provincial areas offer an opportunity to gain access to the otherwise hidden and inaccessible

¹⁵⁶ Key-informant interview with MoRR's representative.

population. MoWA is assisted by international agencies, including UN Women which has supported MoWA in establishing initiatives such as an emergency hotline for women.¹⁵⁷ UN Women has worked with MoWA on an economic strategy for women in Afghanistan, with the key aim to help the government and stakeholders focus on the feasible modalities of economic empowerment of women in Afghanistan.¹⁵⁸ MoWA has maintained a Gender Network to provide insight and input into the strategy.

The Ministry of Justice (MoJ) does not have a specific project for displaced women. However, the ministry runs awareness programmes on human rights especially on *mahr*, inheritance and other rights of women.¹⁵⁹ Furthermore, local branches of the department for legal aid within MoJ provide direct legal assistance to the poor in the areas with an established government presence. A major development within the MoJ has been to extend the scope of legal aid for women to include civil cases as well as criminal cases.¹⁶⁰ On the other hand, there is very little accountability and oversight when it comes to following up on actions that are being undertaken by other ministries and institutions. The number of governmental stakeholders involved in decision-making within the MoJ's procedures often slows down or decreases the chances for legislation to be passed.

Land registration procedures and land-related public information management is the responsibility of the reformed Afghanistan Independent Land Authority (*Arazi*).¹⁶¹ *Arazi* has provincial offices and maintains land records both at the provincial and central level. However, its capacity is still very weak as is the formalisation of the land registration system. Despite the challenges, the institution has announced the development of a Gender Strategy, committing itself to "active support of a gender-sensitive approach", aimed at, among other things, facilitating women's better access to land.¹⁶²

The Afghanistan Independent Human Rights Commission (AIHRC), as the national human rights institution, works closely with international organisations, national NGOs and the MoWA to report and monitor cases. AIHRC is the only organisation mandated by the constitution

157 Funded by Canada this is the first Family Support Hotline (Number 6464) in Kabul that benefits Afghan Women. The national call-centre provides free counselling, legal advice and referrals, including support from an Islamic scholar who provides cultural context for the help offered to ensure its applicability and acceptance.

158 Interview with a UN Women representative participating in the NRC's Women HLP Recommendations Workshop, 2 March 2013, Kabul.

159 Key-informant interview with an MoJ representative.

160 See official web-presentation of the MoJ's Department of Legal Aid at: <http://moj.gov.af/en/page/1674>.

161 See Decree No 23 of the Council of Ministers (September 2009) establishing *Arazi* as a land department or executive agency within the Ministry of Agriculture, Irrigation and Livestock (MAIL); Decree No 2200 (25 June 2013) announcing *Arazi* as Afghanistan's Independent Land Authority merged with the Cadastre department of AGCHO.

162 *Arazi*, An Operational Strategy to become a Modern Public Land Services Institution, March 2014, pp. 11-19, on file with NRC.

to monitor the human rights of any Afghan citizen.¹⁶³ The AIHRC's Women's Rights program is engaged in literacy, education, and empowerment and the monitoring of human rights of women in Afghanistan. The AIHRC works closely with safe houses for women and shelters where they refer survivors of domestic violence. Some of the shelters provide legal assistance to their beneficiaries.¹⁶⁴ AIHRC has highlighted the recognised lack of coordination amongst various stakeholders in addressing women's rights in general.¹⁶⁵

NGOs and civil society

NRC's ICLA programme, provides information, counselling and legal assistance to the displaced and displacement-affected populations in civil legal cases, with the resolution of HLP disputes and legal identity issues being part of the service. NRC also provides a range of HLP-related capacity building and awareness raising sessions for beneficiaries, decision-makers and other stakeholders. The services have been provided from 2003 by around 100 programme staff – mostly lawyers and other legal professionals – across 16 provinces.¹⁶⁶ Since the focus is on civil legal cases, NRC refers criminal cases to other actors working in this jurisdiction. NRC is one of the very few organisations operating in Afghanistan directly delivering services in the domain of HLP rights of displaced Afghan women.¹⁶⁷

Medica Mondiale, a German NGO active in Afghanistan since 2002, provides, among other things, legal support and mediation services for women, as well as human rights training for the police and prison staff. This is provided by around ten female lawyers and social workers located in Kabul, Herat and Mazar-i-Sharif. The legal support, specifically, is provided in cases where women are accused of committing “moral crimes” (*zina*) or adultery, while themselves being victims of defamation, rape or forced prostitution. The mediation is provided in case of inter-family conflicts.¹⁶⁸

The Women and Children Legal Research Foundation (WCLRF), a national NGO has been active since 2003. It carries out research and advocacy on women and children rights, as well as community awareness raising programs some of which are specifically on inheritance and

163 See Article 58 of the Constitution. See also Bonn Agreement, op. cit., Article III.C.6, Decree of the Presidency of the Interim Administration of Afghanistan on the Establishment of an Afghan Independent Human Rights Commission, 6 June 2002, available at: <http://www.aihrc.org.af/media/files/Laws/decrees.pdf>; Law on the Structure, Duties and Mandate of the AIHRC, 14 May 2005, available at: http://www.aihrc.org.af/media/files/Laws/Law_AIHRC.pdf.

164 Key-informant interview with AIHRC's representative.

165 Idem.

166 Badakhshan, Baghlan, Balkh, Faryab, Herat, Jawzjan, Kabul, Kapisa, Kunar, Kunduz, Laghman, Nangarhar, Parwan, Panjsher, Samangan and Takhar.

167 See NRC's ICLA programme description at the beginning of the report and NRC's official web-presentation, available at: www.nrc.no.

168 See official web-presentation of Medica Mondiale, available at: <http://www.medicamondiale.org/index.php?id=108&L=1>.



mahr.¹⁶⁹ The key message underlying this training is the importance of economic empowerment of women and the need for them to be able to access their rights, filling a critical gap in awareness raising.¹⁷⁰

Women for Afghan Women (WfAW), which has been active since 2001, provides services to women in relation to gender-based violence (GBV) and women's rights under *Shari'ah*. The services cover eight provinces, including Badakhshan, Faryab, Kabul, Kapisa, Kunduz, Mazar-i-Sharif and Sari Pul, with legal aid and defence lawyers in each of these areas. WfAW have established walk-in *Family Guidance Centres*, which focus on counselling, legal assistance and awareness¹⁷¹ for people affected by human rights violations, including domestic violence, VAW, forced and under-age marriages, and *baad*.¹⁷²

169 Key-informant interview with WCLRF's representative.

170 See official web-presentation of WCLRF, available at: <http://www.wclrf.org.af>.

171 Key-informant interview with WfAW's representative.

172 See official web-presentation of WfAW, available at: <http://www.womenforafghanwomen.org>.

The *Organization for Human Welfare* (OHW)¹⁷³ provides limited legal aid to women in the South and Southeast areas of Afghanistan. OHW is still in the process of building its legal aid expertise, being active only since 2013.

A few other civil society organisations work in focus areas or with key target groups with regard to HLP. *Humanitarian Assistance for the Women and Children of Afghanistan* (HAWCA), a civil society organisation established in 1999 by Afghan youth, implements projects throughout Afghanistan including Kabul, Bamyan, Herat, Nangarhar and Daykundi, aimed at awareness raising on women's rights and runs legal aid centres and shelters for female survivors of VAW.¹⁷⁴ Independent social activists established their own civil society organisations like the *Research Institute for Women Peace and Security* (RIWPS) – in Afghanistan in 2010. RIWPS is focused on research and capacity building focused on women's meaningful participation in peace processes.

International governmental aid agencies

Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ), which has been active since 2001 in Afghanistan, has integrated a gender-mainstreaming component into their programming. Their main aim is to facilitate access to justice, working together with the Afghanistan Independent Bar Association (AIBA) and MoJ. The focus is on capacity building for staff at the provincial level,¹⁷⁵ including district-level outreach and awareness building. GIZ has also worked with the Civil Mediation Department (*huqooq*) on land issues in Balkh, Takhar and Badakhshan, training government officials. They also focus on communities and Community Development Councils (CDCs)¹⁷⁶ providing information about land law and regulations. More broadly, they have worked with the Afghanistan Women's Network and MoWA funding a women's shelter and working with female members of CDC's, encouraging them to take part in the national discourse.¹⁷⁷

In the area of land management, a USAID-funded Land Reform in Afghanistan (LARA) project has worked to assist with formalising informal settlements, digitise land records and deeds and streamline the country's land management¹⁷⁸ through assisting *Arazi* and other land-related institutions. On the legal side, LARA has been contributing to the process of reviewing land legislation, reducing corruption within the

173 See official web-presentation of OHW, available at: <http://www.ohw.org.af>.

174 See official web-presentation of HAWCA, available at: <http://www.hawca.org/main/index.php>.

175 For instance, GIZ supported the formation of the bar association in Kunduz.

176 Community Development Councils (CDCs) have been launched as part of the National Solidarity Programme (NSP), which was established in mid-2003 as a government Programme executed by the Ministry of Rural Rehabilitation and Development (MRRD). CDCs are community initiatives, elected bodies and are a foundation for local governance and consultation and are being actively supported by some NGOs, UN agencies and donors for implementation of various projects in the communities.

177 Key-informant interview with GIZ's representative. See official web-presentation of GIZ, available at: <http://www.giz.de/en/worldwide/358.html>.

178 Key-informant interview with LARA's representative.

government and others working on land issues, and capacity building to improve and streamline land tenure processes. LARA's cross-cutting activities include gender issues and community based resolution for which the project developed guidelines. Together with MoWA, the project also launched the *Women Land and Inheritance Rights* information and public awareness campaign (December 2012). However, LARA does not directly assist displaced women in accessing their HLP rights.¹⁷⁹

CAPACITY BUILDING TOWARD WOMEN'S LAND RIGHTS TASK FORCE

USAID's LARA project created the Women's Land Rights Task Force (WLRTF), the members of which are parliamentarians, religious scholars, women from MoWA (and its line departments), NGOs and private sector representatives. In 2012, two conferences were held – in Kabul a conference raised awareness about women's land rights and inheritance, and in Jalalabad a conference provided guidance to the public, government officials and task force members to respond to practical considerations. Upon discussions with relevant authorities about the sustainability and effectiveness of this task force, the first meeting of the WLRTF was held in Arazi premises in Kabul in June 2013. The meeting indicated the first step toward transferring the WLRTF's secretariat from LARA to *Arazi*, as a part of the sustainability strategy. The project maintains its outreach to the women's network, the Afghanistan Protection Cluster (APC) and includes displaced women as a sub-focus of the broader work on women's land rights, in coordination with MoRR.

UN Agencies

Among the UN agencies present in Afghanistan, UNHCR aims to safeguard the HLP rights of displaced women. In the course of UNHCR's support for the Land Allocation Scheme (LAS) with MoRR, it was observed that there is a recognised neglect of HLP issues in the humanitarian review.¹⁸⁰ UNHCR, along with NRC, co-chairs the Housing, Land and Property Task Force (HLP TF), which falls under the APC and has covered, since 2013, displaced women's HLP rights.

UNDP and UN Women are both working directly on issues of gender and justice – UNDP through its *Gender Equality Project* (GEP) and UN Women through its work on economic strategy and legislation development and resource centres for girls to access. The UNDP's GEP-II (2013-2015) deals with improving women's access to justice and human rights, women's economic empowerment and policy review and support. These include training counterparts on legal aspects related to women's rights, establishing women's legal help centres, which focus on VAW and women's political and social rights¹⁸¹ With specific regard to access to justice, GEP-II is expected to increase women's access to legal aid and, when required, to the state justice system under the MoWA and MoJ collaborative arrangement.¹⁸²

179 Idem. See official web-presentation of LARA, available at: <http://www.lara-af.com/about.html>.

180 Key-informant interview with UNHCR's representative.

181 Key-informant interview with UNDP's representative.

182 See UNDP GEP-II official web-presentation, available at: http://www.af.undp.org/content/afghanistan/en/home/operations/projects/womens_empowerment/gepii.

GENDER NETWORK AND WOMEN'S ECONOMIC EMPOWERMENT AND RIGHTS STRATEGY

In 2011, UN Women with MoWA and the former Canadian International Development Agency (CIDA) as the main donor, reached out to the Gender Network to empower the mechanism. In 2013, UN Women with MoWA developed a women's economic empowerment and rights strategy through the network. The next step is implementation – with a work plan encompassing five to ten years. The leading entity is MoWA with future coordination required between the government, UN agencies and NGOs. The approach is programmatic rather than project-based, to allow the Government of Afghanistan sufficient time to design and implement projects relating to the broader issues of women's economic empowerment and rights.

This strategy came about from the realisation that the current system allowed insufficient attention to women's economic empowerment, with no specific law for women's rights in respect of economic empowerment. The need was voiced to incorporate women's HLP issues within the strategy, given the important economic, cultural and institutional obstacles preventing women from accessing their rights. Such initiatives require MoWA leadership and close cooperation between the MoJ, Ministry of Economy (MoE), Ministry of Finance (MoF) and Ministry MAIL.

PROGRAMMING GAPS AND CHALLENGES

6.3

Enabling women's access to HLP rights is a difficult task for a number of reasons. Afghanistan serves as a dangerous and difficult environment to work in, where stakeholders' operations are often susceptible to events beyond their control. The following are some of the key programming gaps and challenges:

Functional (legal aid) coverage

As observed, very few organisations provide legal aid to women with regard to HLP issues. The majority of those who provide legal aid focus more on purely domestic violence incidents or the aspects of HLP cases related to physical violence. NRC's ICLA programme is one of the few programmes to directly address the HLP issues faced by displaced women, including cases of inheritance and *mahr*.

The International Legal Foundation in Afghanistan (ILFA) and the Legal Aid Organisation of Afghanistan (LAOA) also provides legal aid services to vulnerable groups of Afghans. Independent lawyers, both male and female, handle cases pertaining to inheritance and *mahr*. However, they do not focus on any particular target groups. Whilst the MoJ has made a significant step forward by extending the scope of legal aid for women to civil legal cases, due attention still remains to be paid to the impact on implementation of still insufficient sub-national capacities. There also needs to be awareness raising in relation to this initiative as in an environment where local dissemination of information is challenging, this referral system and its coordination is a critical opportunity to reach out to as many women as possible.

Geographical coverage

The challenge of geographical coverage manifests itself at multiple levels: provincial, district and local. Most agencies implement projects across relatively secure provinces, but the majority of the country, where the need for legal aid is paramount, remains outside of such projects' implementation areas due to either security, logistical or resource constraints. Larger key provinces like Herat and Balkh have a better institutional and organisational presence when compared to provinces like Badghis, Baghlan or Kapisa. Due to the precarious security situation, there is limited or no legal assistance in the areas of the country where women's access to their HLP rights is particularly challenging, such as the Pashtun areas of the South and Southeast. There are a number of regions that are too remote and difficult to reach which fall outside the radar of international agencies, and there is insufficient capacity on the side of national agencies to fill in the gap. Even when organisations are present at the provincial level, the actual coverage is limited to only a number of secure and reachable districts.

In order to provide legal aid, organisations must have local presence and wide outreach. Again, due to security reasons and programming limitations, very few organisations have the grass-roots presence in villages or mobile teams that can travel from one village to another rather than remain stationed in one office. Despite the significant challenges with operational presence, opportunities exist that can be tapped in order to improve outreach. Apart from the women's Community Development Councils, informal networks of women exist in villages, based on friendships, familial and other communal relations. Women often approach male community elders through the women within their households. These networks are and can be further utilised as a good source of outreach, as well as information, for organisations working at the grassroots levels.

Stakeholders will continue to face situations of increasing insecurity and reduced access. In light of this, it is critical that resources are shared and networks established. Varied expertise and geographical presence can be an opportunity as much as a challenge. Coordination agencies such as the Office for the Coordination of Humanitarian Assistance (OCHA) as well as other UN agencies should consider developing specialised networks and coordination mechanisms that could address specific issues including the HLP rights of displaced women.

Selective emphasis on violence against women

The approach of NRC and LARA is unique and offers a different perspective on the way stakeholders usually approach women's rights in Afghanistan. Most stakeholders try to address first the (physical) domestic violence (through e.g. offering safe-heaven, psycho-social support, vocational training etc.) and, in that way, enable a woman to become economically independent.

Conscious of the indicative causal linkages between VAW and HLP,

and based on direct experience, NRC's approach to women's HLP rights is to primarily enable women to access their HLP rights in order to make them physically safe and economically self-sufficient. Information availability, especially in terms of sharing success stories of women who managed to obtain their HLP through legal aid, can be a means to encourage and facilitate a drive for women to become economically independent, despite the odds.

Monitoring and evaluation

Interviews with HLP stakeholders raised important issues concerning the sources and forms of monitoring and evaluation. For issues such as HLP and legal assistance, performance of a project or programme is largely evaluated through quantitative indicators, including numbers of beneficiaries, numbers of cases solved/unsolved and type of justice sectors used. Whilst quantitative data has its merit and its place, the analysis of qualitative information is critical in uncovering the nuances of an issue. In the case of HLP rights, case histories of women who have tried to claim their HLP rights are an excellent source of information on the challenges that they faced and the causes and consequences of demanding their HLP rights. Women's access to HLP rights cannot be grasped through only numeric information on resolved cases partly because there are different understandings and definitions of resolved cases across agencies.¹⁸³ Despite all this, stakeholders frequently neglect the need for collection and analysis of qualitative data. In some studies, the lack of analysis is traced to the use of multiple information collection tools and the lack of a consolidated database, which enable a qualitative analysis.¹⁸⁴ A standardised approach and deeper insight is needed as to issues such as, the actual resolution outcome (in favour or against a woman), the decision implementation status and overall sustainability of the solution.

Coordination

The stakeholders that address displaced women's HLP rights work in sectors such as displacement, women's affairs and justice, and according to different humanitarian, development, governmental and non-governmental mandates and missions. These differences result in the existence of several types of coordination mechanisms, which can make coordination difficult when it comes to focusing on the resolution of specific issues. The challenge is to bridge the gap between the humanitarian and development components to ensure an adequate transition between the two, as well as a later effective transfer and ownership of programme activities to the government.

¹⁸³ On a number of occasions when an HLP case is considered "solved", it meant that the client has stopped effectively fighting for his case or has been forced to reach a compromise – either by the defendant or the justice mechanisms itself. This implies that the woman was technically not given the full extent of what in reality was her HLP right. The acceptable definition of a solved case necessarily implies not just issuance of the decision on the HLP subject matter, but also that the decision implementation.

¹⁸⁴ See NRC, IDMC et al., op. cit., pp. 58-59.

The HLP Task Force (HLP TF) is the closest coordination mechanism that falls within the remit of women's HLP. It is chaired by UN-Habitat and co-chaired by UNHCR and NRC. In 2012, the focus of the HLP TF was to consider issues of forced evictions, land grabbing, security of tenure and mainstreaming of HLP issues across other clusters. In 2013, the previously neglected issue of displaced women's access to HLP rights was promoted to one of the priorities. The HLP TF was restructured, starting with the introduction of a dedicated HLP TF Coordinator in September 2013, to make it practical, thematic/issues-oriented, timely and effective. Due to its legal assistance expertise, NRC is the primary source of information on displaced women's HLP issues.¹⁸⁵

The TF has been slowly consolidating across Afghanistan – but while it is regularly convened at national level and in the East, North and West regions, the South and Central regions have been lagging behind. This is due to a combination of factors, including insufficient functional and geographic coverage of the area by HLP-specialised agencies and their re-prioritisation of available resources. Furthermore, the HLP TF is part of the Afghanistan Protection Cluster (APC) whose mandate is humanitarian rather than development. HLP issues may often fall outside the scope of purely humanitarian action requiring a gradual shift in the HLP TF to a development and government-led coordination forum. While the Afghanistan Independent Human Rights Commission (AIHRC) co-leads the HLP TF in some regions due to its specific mandate as a national human rights institution, identifying a competent government counterpart to eventually lead the HLP TF is another challenge, given the multitude of government actors with varying degrees of HLP competencies and capacities.

Coordination and transitional planning in the context of weak government capacity is even harder when the cross-cutting gender component is factored in. However, relevant networks do exist and can be used to focus on micro-issues within a target population such as displaced women's HLP rights. The LARA-established Women's Land Rights Taskforce (WLRTF) is an exemplary case. Similarly, the MoWA-managed Gender Network is another mechanism that offers an opportunity for actors coordinate to solve problems. A third potential network is the GBV sub-cluster, within the Afghanistan Protection Cluster. All of the above, in terms of thematic and geographical coverage, as well as different yet complementary mandates, offer ways to increase the coordination amongst actors from various fields towards one common crosscutting cause.

185 Idem.



CONCLUSION AND RECOMMENDATIONS

Enabling access to justice for women in Afghanistan is an extremely challenging task, because of their social status as well as the complicated nature of the Afghan justice structures. The position of Afghan displaced women is particularly vulnerable.

Sufficient legal provisions are in place to provide a strong basis to defend women's HLP rights, despite the paramount need to bring some of them in line with applicable international human rights law, particularly the non-discrimination principle. However, there is a clear gap between the formal protection of women's HLP rights as guaranteed by the applicable legal frameworks in Afghanistan – including *Shari'ah* – and the on-the-ground reality of women's actual access to their rights.

The scope of women's access to justice is not uniform across provinces and situations. The economic, socio-cultural and institutional challenges faced across the country are numerous. Afghan women are only willing to claim their HLP rights when they have no alternative means of subsistence or securing financial independence. It is a measure of absolute last resort where women are willing to risk social stigmatisation, ostracism and sometimes physical violence, as they have no other alternative. There are many factors which mean that women never make a claim, are deterred from making claims or give up on a claim that they have made. These factors include a general lack of awareness of their rights, the strong possibility of losing their social protection network, exorbitant procedural and related costs, movement restrictions and an anticipated justice bias. All these factors limit women's independence and increase their susceptibility to being overruled by others' interests.

The inherent weaknesses of Afghan legal pluralism, embodied through competing statutory and customary justice sectors, are a significant obstacle for access to justice for women. The justice sector's serious lack of effective presence, knowledge, gender sensitivity, impartiality or enforcement authority leads to poor outcomes – especially for additionally vulnerable displaced women. Displaced women rarely hold the appropriate personal and HLP documentation which means they do not have the legal standing to bring claims before the statutory justice system. A lack of access to legal aid means they cannot overcome these hurdles. This, coupled with the perceived socially invasive character of statutory justice, compels women to seek and accept controversial compromises before the patriarchal forums of the customary justice system. Compromise is preferred in order to maintain women's socio-cultural status within acceptable limits of customary norms. Consequently, women may be required to rescind some part of their autonomy that they fought hard to achieve in the first place. Despite all this, the effective absence of statutory justice prompts the need for pragmatic solutions, including through the use of traditional justice mechanisms.

In such an environment, humanitarian and development actors in charge of funding, delivering or facilitating free legal assistance and overall justice support have faced a number of strategic, programmatic and operational challenges. These include a lack of expertise, lack of access

based on precarious security or logistical issues, dwindling resources, lack of qualitative monitoring and evaluation due to different base concepts, definitions, methodologies and data collection and analysis tools, as well as diverging (humanitarian and development) missions and mandates and the resulting coordination glitches.

Even after over a decade of intensive aid, Afghan women remain extremely vulnerable to exploitation, violence, poverty and destitution. This serves as a resounding testimony to the very slow progress, despite the invested efforts, towards building an environment where women (let alone displaced women) can enjoy their rights freely.

RECOMMENDATIONS

The recommendations in the study are aimed at improving the environment in Afghanistan for displaced women in respect of their HLP rights. As such, the recommendations aim at providing a roadmap for:

- ▶ Addressing practical and institutional obstacles to justice for women.
- ▶ Strengthening stakeholder interventions and coordination.
- ▶ Building awareness and advocacy.

NRC calls for a national acknowledgement of displaced women's HLP rights and the identified issues affecting women's enjoyment of the rights nationwide. It also serves as a reminder of international standards on women's access to HLP rights and the importance of complying with them.

To the Afghan Government – Ministry of Justice

1. **Increase the availability of legal aid services** across Afghanistan to support women's engagement in civil legal cases. Make services available in areas with high numbers of IDPs and refugee-returnees.
2. **Develop collaborative legal aid schemes**, where possible, in cooperation with identified competent and capable non-governmental and community-based stakeholders, to address the legal aid needs of women in the course of traditional dispute resolution.
3. **Consider piloting mobile court programmes** to increase access to justice for displaced women in remote and rural areas.
4. **Ensure the full implementation of ERAW and related laws** including through the provision of training to law enforcement personnel on the psychological and security risks associated with women's pursuit of HLP rights.

To humanitarian and development actors

5. **Implement programmes that support the Ministry of Justice legal aid capacity.** Allocate funding for the development of legal aid services for women in high areas of return and areas with high numbers of IDPs. Raise funds for mobile courts programmes.

6. **Conduct a feasibility study on mobile courts programme** aimed at enabling access to statutory justice for displaced women in remote rural areas of Afghanistan and, where applicable, support the programme to target remote and rural areas with a high concentration of displaced populations.
7. **Support, fund, develop and consolidate data collection and analysis tools** related to HLP issues across the stakeholder landscape, under the IASC HLP Task Force. Place a special focus on the collection and analysis of qualitative information through the inclusion of qualitative performance and impact indicators into programme design.
8. **Conduct tailored introductory, follow-up training and training-of-trainers (ToT) sessions** for local *jirgas*, *shuras* and communities on women's HLP rights in the displacement context. These should be facilitated and provided by community-accepted and fully qualified trainers and aimed at specifically selected training target groups.
9. Utilise media and technology, including wide coverage television, radio and mobile phone for **public outreach and awareness raising campaigns** about the most critical specifics of women's HLP rights, through simple messages.
10. Propose a clearly delineated **competence scope of traditional dispute resolution mechanisms** in terms of their acceptable engagement in legal issues related to women's access to HLP.

BIBLIOGRAPHY

- Armytage, Livingston, 2007, "Justice in Afghanistan: Rebuilding Judicial Competence after the Generation of War", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht (fZaöRV)* 67, available at: http://www.zaoerv.de/67_2007/67_2007_1_b_185_210.pdf
- Barfield, Thomas, 2008, "Culture and Custom in Nation-Building: Law in Afghanistan", *Maine Law Review*, Vol. 60, No 2, available at: http://mainelaw.maine.edu/academics/maine-law-review/pdf/vol60_2/vol60_me_1_rev_347.pdf
- Bradley, Megan, 2008, "Obstacles to realizing Guiding Principle 29 in Afghanistan" in *Forced Migration Review (FMR) – GP10*, available at: <http://www.fmreview.org/FMRpdfs/GP10/GP10.pdf>
- Carberry, Sean, 2012, "Afghans Begin New Exodus, Often At Great Cost", *NPR*, available at: <http://www.npr.org/2012/12/02/166018997/afghans-begin-new-exodus-often-at-great-cost>
- Centre for Inquiry, *Islam and Human Rights: Defending Universality and the United Nations*, September 2008, available at: http://www.centerforinquiry.net/uploads/attachments/ISLAM_AND_HUMAN_RIGHTS.pdf
- Coburn, Noah and Dempsey, John, 2010, "Informal Dispute Resolution in Afghanistan", *USIP Special Report 247*, available at: <http://www.usip.org/sites/default/files/sr247.pdf>
- Foley, Conor, 2011, *A Guide to Property Law in Afghanistan*, Second Edition, NRC Kabul
- Gerald N. Hill and Kathleen Thompson Hill, 2005, *The People's Law Dictionary*, available at: <http://dictionary.law.com>.
- GoA Ministry of Finance, 2009, *Donor Financial Review*, available at: <http://www.undp.org.af/Publications/KeyDocuments/Donor'sFinancialReview%20ReportNov2009.pdf>
- GoA Ministry of Finance, 2009, *Donor Financial Review*, November 2009, available at: <http://www.undp.org.af/Publications/KeyDocuments/Donor'sFinancialReview%20ReportNov2009.pdf>
- Grace, Jo, 2005, 'Who Owns the Farm? Rural Women's Access to Land and Livestock', *Working Paper Series*, AREU, available at: <http://www.areu.org.af/Uploads/EditionPdfs/503E-Who%20Owns%20the%20Farm-WP-print.pdf>
- Grace, Jo and Pain, Adam, 2004, Rethinking Rural Livelihoods in Afghanistan, *Synthesis Paper Series*, AREU, available at: <http://www.areu.org.af/Uploads/EditionPdfs/424E-Rethinking%20Rural%20Livelihoods%20SP.pdf>
- Graves, Peter, 2012, *Review of IFAD Amendment Bill 2012*, submission to Joint Standing Committee on Foreign Affairs, Defence and Trade, available at: http://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=jfadt/ifad+bill+2012/subs/sub1.pdf
- Hilhors, Thea and Porchet, Nicholas, 2012, *Food Security and Land Governance Factsheet*, The Royal Tropical Institute KIT, available at: <http://www.landgovernance.org/system/files/Afganistan%20Factsheet%20-%202012.pdf>
- Hill, Gerald N. and Thompson, Kathleen, 2005, *The People's Law Dictionary*, available at: <http://dictionary.law.com>
- Human Rights Watch (HRW), 2012, "I had to Run Away": *The Imprisonment of Women and Girls for "Moral*

Crimes” in Afghanistan, available at: http://www.hrw.org/sites/default/files/reports/afghanistan0312web-wcover_0.pdf.

ICON Institute, 2008, *National Risk and Vulnerability Assessment 2007/8: A Profile of Afghanistan – Main Report*, available at: http://ec.europa.eu/europeaid/where/asia/documents/afgh_nrva_2007-08_full_report_en.pdf

IDLO, 2014, *Women’s Professional Participation in Afghanistan’s Justice Sector: Challenges and Opportunities*, available at: http://issuu.com/idlonews/docs/idlo_afghan_report

International Crisis Group – ICG, 2010, “Reforming Afghanistan’s Broken Judiciary”, *Asia Report No 195*, available at: [http://www.crisisgroup.org/~media/Files/asia/south-asia/afghanistan/195%20Reforming%20Afganistans%20Broken%20Judiciary.pdf](http://www.crisisgroup.org/~/media/Files/asia/south-asia/afghanistan/195%20Reforming%20Afganistans%20Broken%20Judiciary.pdf)

Ipsos/International Committee of the Red Cross – ICRC, 2009, *Our world. Views from the Field. Afghanistan: Opinion Survey and In-Depth Research*, available at: <http://www.icrc.org/eng/assets/files/2011/afghanistan-opinion-survey-2009.pdf>

Khan, Ahmad, 2012, *Women and Gender in Afghanistan*, Civil-Military Fusion Centre, available at: https://www.cimicweb.org/cmo/afg/Documents/Afghanistan-RDPs/CFC_Afghanistan_Women-and-Gender_Feb12.pdf

Lau, Martin, 2003, *Afghanistan’s Legal System and its Compatibility with International Human Rights Standards: Final Report*, International Council of Jurists (ICJ), available at: <http://www.refworld.org/docid/48a3f02c0.html>

Macdonald, Ingrid, 2011, “Landlessness and Insecurity: Obstacles to Reintegration in Afghanistan” in *Middle East Institute – Fondation pour la Recherche Strategique (MEI-FRS)*, available at: http://www.refugeecooperation.org/publications/Afghanistan/04_macdonald.php

Majidi, Nassim, 2011, “Urban Returnees and Internally Displaced Persons in Afghanistan” in *MEI – FRS*, available at: http://www.refugeecooperation.org/publications/Afghanistan/01_majidi.php

Maletta, Hector, 2007, *Arable Land Tenure in Afghanistan in the post Taliban era*, available at: [https://www.cimicweb.org/cmo/Afghanistan/Crisis%20Documents/Social%20Well-Being/SCD%20Top%20News/SSRN-id908669\[1\].pdf](https://www.cimicweb.org/cmo/Afghanistan/Crisis%20Documents/Social%20Well-Being/SCD%20Top%20News/SSRN-id908669[1].pdf)

NRC, 2005, *A Report on: Afghanistan’s Special Property Disputes Resolution Court*, available at: [http://www.internal-displacement.org/8025708F004CE90B/\(httpDocuments\)/7B294E9B3DAE1B2A802570B-700587CBF/\\$file/Report+-+Afghanistan’s+Special+Property+Disputes+Resolution+Court.pdf](http://www.internal-displacement.org/8025708F004CE90B/(httpDocuments)/7B294E9B3DAE1B2A802570B-700587CBF/$file/Report+-+Afghanistan’s+Special+Property+Disputes+Resolution+Court.pdf)

NRC, 2009, *Building Linkages between the Formal and Informal Justice Systems in Afghanistan: A Review of Collaborative Approaches in the Province of Herat: Final Report*, available at: <http://www.nrc.no/arch/img/9683690.pdf>

NRC and IDMC, 2013, *Housing, Land and Property Training Manual*, available at: <https://www.nrc.no/?did=9642898>

NRC, IDMC, JIPS and Samuel Hall, 2012, *Challenges of IDP protection – Research Study on the protection of internally displaced persons in Afghanistan*, available at: <https://www.nrc.no/arch/img/9665970.pdf>

OCHA, 2013, *2014 Humanitarian Needs Overview: Afghanistan*, available at: <https://afg.humanitarianresponse.info/document/chap-2014-humanitarian-needs-overview>

OCHA, August 2014, *Humanitarian Bulletin: Afghanistan*, available at: http://www.humanitarianresponse.info/system/files/documents/files/MHB_August_2014_Final.pdf

- OECD, 2010, *Aid in Support of Gender Equality and Women's Empowerment: Statistics based on DAC Member's reporting on the Gender Equality Policy Marker, 2007-2008*, available at: <http://www.oecd.org/dac/stats/42759705.pdf>
- Ovey, Clare and White, Robin C.A., 2002, *Jacobs & White, European Convention on Human Rights*, Oxford University Press
- Roe, Alan, 2008, "Water Management, Livestock and the Opium Economy – Natural Resources Management Farming Systems and Rural Livelihoods" in *Synthesis Paper Series*, AREU, available at: <http://img.static.reliefweb.int/sites/reliefweb.int/files/resources/855A159D714CBB77492574F500275D8C-FullReport.pdf>
- Rought Brooks, Hannah, 2013, *Realities from the Ground – Women's Housing, Land and Property Rights in the Gaza Strip*, Norwegian Refugee Council
- Sait, Siraj and Lim, Hilary, 2005, *Islam, Land and Property Research Series – Paper 5: Muslim Women and Property*, UN-Habitat, available at: ww2.unhabitat.org/programmes/landtenure/documents/ILP%205.doc.
- Sait, Siraj and Lim, Hilary, 2007, *Land, Law and Islam: Property Rights in the Muslim World*, Zed Books Ltd, New York
- Schneider, Irene, 2007, "Recent developments in Afghan family law: Research Aspects" In *ASIEN* 104: 106-118
- Special Inspector General for Afghanistan Reconstruction – SIGAR, 2014, *Support for Afghanistan's Justice Sector: State Department Programs Need Better Management and Stronger Oversight*, SIGAR 14-26 Audit Report, available at: http://www.sigar.mil/pdf/audits/SIGAR_14-26-AR.pdf
- Thieme, Olaf, 2006, *Country Pasture/Forage Resource Profiles: Afghanistan*, FAO, available at: <http://www.fao.org/ag/agp/AGPC/doc/Counprof/afgan/afgan.htm>
- The Liaison Office (TLO), 2013, *An Exploratory Study of Afghan Tazkera Ownership*
- Tucker, Judith E., 2008, *Women, Family and Gender in Islamic Law*, Cambridge University Press
- UNAMA and OHCHR, 2011, *A Long Way to Go: Harmful Traditional Practices and Implementation of the Law on Elimination of Violence against Women in Afghanistan*, available at: http://www.ohchr.org/Documents/Countries/AF/UNAMA_Nov2011.pdf.
- UNHCR (2013), *Solutions Strategy for Afghan Refugees: Summary Progress Report*, available at: <http://www.unhcr.org/522722e99.html>
- UNHCS (Habitat), 1999, *Women's Rights to Land, Housing and Property in Post-Conflict Situations and During Reconstruction; a Global Overview*, available at: <http://www.unhabitat.org/pmss/listItemDetails.aspx?publicationID=1926>
- UN Women, 2011, *Who Answers to Gazan Women? An Economic Security and Rights Research*
- USAID, 2011, "Land Tenure, Property, Rights, and Gender: Challenges and Approaches for Strengthening Women's Land Tenure and Property Rights", *Property Rights and Resource Governance Briefing Paper No 7*, available at: http://usaidlandtenure.net/sites/default/files/USAID_Land_Tenure_Gender_Brief_0.pdf
- Wardak, Ali, 2011, "State and Non-State Justice Systems in Afghanistan: The Need for Synergy", *U.*

P. J. Int'l L., Vol. 32, No. 5, available at: [https://www.law.upenn.edu/journals/jil/articles/volume32/issue5/Wardak32U.Pa.J.Int'lL.1305\(2011\).pdf](https://www.law.upenn.edu/journals/jil/articles/volume32/issue5/Wardak32U.Pa.J.Int'lL.1305(2011).pdf)

Wily, Liz Alden, 2012, *Land, People, and the State in Afghanistan: 2002-2012*, Afghanistan Research and Evaluation Unit (AREU), available at: <http://www.areu.org.af/Uploads/EditionPdfs/1303E%20Land%20I%20CS%20Feb%202013.pdf>

Women and Children Legal Research Foundation (WCLRF) and UN Women, 2011, *Women's Right to Heritage and Property: Research Report*, available at: <http://www.wclrf.org.af/wp-content/uploads/2013/09/Womens-access-to-inheritance-English-book.pdf>.

