Chapter 3: Legal System in Afghanistan

Introduction

Afghanistan is unique in its location where the mosaic of ethnic groups, settled across the rugged and tiring terrain command a strategic location for many powerful states from its early history. Internal ethnic conflicts always lured external powers with the intention to get hold of Afghanistan making the state unstable and insecure. It therefore implies that the rights and equality can be ensured only if there is security. As such, security for the perilous state of Afghanistan is the foremost and an urgent need with an equal emphasis required for the development of state’s justice system in the present situation. Afghanistan state judicial system is complex with the perception of dissatisfaction among many who have no faith in it. People especially from the rural areas prefer informal customary justice system which is also criticised for not being in consonance with the international human rights standard. The lack of proper infrastructure, access to applicable statutes and legal materials, untrained judges and practitioners, corruptions, warlords, etc., adds to the problems of Afghanistan’s legal system.

1. Judicial System in Afghanistan

It is interesting to note that in Afghanistan there are three laws, viz., the state law, the Islamic law, and the customary laws. Above these laws there are pressures from the external organisations to enforce the international human rights laws and conventions. The state law is closely linked with Islamic Sharia laws and the customary laws. The customary laws which had contributed to the formation of the modern judiciary prevail and are preferred even today in different part of the rural and tribal society. The customary laws and Islamic laws are used in informal legal system. It is also applied in the formal legal system to some extent especially in the sphere of family. In spite of the introduction of statutory laws, there were cases where judges generally apply Islamic laws. It is mainly because of the lack of institutions and its limited application of most modern written laws. The current justice system is divided into two, the formal and the informal mechanism. The Jirga/Shura justice mechanism with that customary laws and
the Islamic law (Sharia) are informal justice system while State legal system with the national law constitutes the formal legal system. The Islamic law especially the Hanafi plays a significant role in Afghanistan judicial system.

Afghanistan had Sharia court and state court side by side during 1880s – 1960s, Sharia court dealt with criminal law, family and personal laws whereas the state law dealt with matters mainly related to commerce, taxation and civil servants. The significant change brought in Afghanistan judicial system by the 1964 constitution introduced Article 97, declaring the independence of Afghan judiciary, creating a unified hierarchical judicial system and made unified system of law (Their 2004: 6). Theoretically, the constitution made state’s law above all other laws in Afghanistan. Thereafter, the Sharia laws are excluded from judicial proceeding except when there is no provision in constitution to deal in the case. The state codified law by the codification drive in the mid-1960s to mid-1970s and the structure of court was introduced by 1967 laws with Supreme Court, Central high court of appeal, Provincial court and Primary court (Ibid: 6-7). These features of judicial system remain with the little change in the contemporary judiciary.

There are numerous of problems in the Afghan legal institutions like lack of staff and other facilities such as applicable statutes and legal materials related to secular laws. With the lack of facilities in secular legal system, they depend upon Islamic law and other social and customary laws. At the same time, there is a growing tendency among Islamic groups or political party inclined to religious issue for quest of power and legitimacy which in turn degrade the state legal system. Thus, the legal system has been inclined towards Islamic law.

The statutory law of Afghanistan was introduced by the Amanullah in the early 20th century and the codification of laws was done during 1960s and 1970s (Schneider 2007: 107). Though there was an attempt to introduce Soviet-style judiciary by the Marxist government in 1978 with many alterations in Afghan laws and legal system, it was not successful. There were two types of legal systems in Afghanistan i.e., the informal Islamic laws court and the formal state laws court before the introduction of
unified courts by the 1964 constitution (Senier 2006: 1). The criminal, family, and personal cases were appealed and resolved or brought under judgements according to Islamic laws (Sharia). On the other hand, the case of commercials, taxes, public servants and other government related cases were solved by state court. Even after the unified court was introduced in Afghanistan, the traditional religious and tribal court is still popular in the rural and conservative families. In spite of the change of regimes in Afghanistan, it does not affect much of the traditional legal system until the downfall of Taliban.

The Post-Taliban government of Afghanistan undergone through problems of control and administration in many fields, including legal system, in certain areas where there are stronghold of warlords and commanders outside Kabul. The state legal system is operating only in some urban centre where there are problems of political instability and insecurity. The state court in rural Afghanistan has no basic facilities. The judicial officials and their proceedings are under the influence of the certain people who have power to intimidate or to threaten them or any other measures that directly and indirectly affects the state judicial system. Besides, the court officials including the judges and prosecutors have no sufficient qualification to run the judiciary. This made the people to stick on with the age-old customary legal system. The absence of rights to fair trial, rights of defence, widespread arbitrary detention and discrimination of the women by both traditional and state justice system are other major causes of concern in Afghanistan.

2. Legal Position of Women in Afghan Law

The constitution of Afghanistan provides women many provisions to the equal status as men. The 1964 Constitution itself gave the equal status before the law to men and women. In fact, the family laws have separate rights for men and women. The introduction of the reform of civil code in 1977 repealed the laws of marriage of 1960 and introduced the minimum age as 15 years to be legally marriageable. Women were permitted to choose their husband without prior consent from their parents. Polygamy is also regulated by the civil code of 1977. The husband should prove himself to give justice to all wives and should give concrete reason(s) why he has to marry another woman. The
reason could be barren on the part of the woman, incurable sickness and the like. On the other hand, a wife can file for divorce if her husband on any circumstance marries a second wife.

The other reasons for women to file for divorce from her husband are if he has incurable disease, or if he is not with her without valid reason for more than three years or if he cannot maintain the necessity. There are also provisions for a wife to file for divorce in five years from her husband if he is in prison for 10 years or so. In spite of these legal rights, women rights to divorce are more restricted comparatively with men who have extra-judicial rights to divorce his wife (Lau 2002: 25).

The family laws in Afghanistan are still under the shadow of un-reformed Hanafi family law and customary law. Though the 1977 civil law introduced family court, it has not been practiced. Many women do not even know that they have rights envisaged in the constitution. Similarly, women who know their rights are inaccessible to the concerned courts and lawyers without the assistance of male relatives.

There has been a considerable improvement in the condition of women in every spheres including legal status in the post-Taliban Afghanistan. But, the position of Afghan women in terms of legal rights are still lacking far behind. Women legal rights were taken away during the rule of Taliban for a long period of time. The impact of Taliban rule still remains in many parts of Afghanistan. The condition of Afghan women in health sector, economy, employment, education needs to be developed side by side along with the upliftment of their legal status.

It is unfortunate that for many girls and women in Afghanistan, their grievances often go unheard and they are not able to bring them to justice. Impunity in women related crimes and discrimination against women is another sordid aspect in Afghanistan justice system. There is no free access to the justice system to put forward their grievances and defend their rights. Women and girls have to reach the police court and prosecutor with the assistance of a man relative or someone has to approach on their behalf.
Crimes against women in the family are ignored by police and the court. It is considered as a private affair in which there is no provision that clearly criminalises violence in private sphere in the criminal code of Afghanistan (AI Annual Report 2003: 5). The victim of rape case has to undergo virginity test for the witness to be presented in the court as there is no forensic investigations facility. Rape victims fear to go to the police or court for they know the unavoidable and unwanted consequences and there is even a chance that they will be accused of unlawful sexual activity (Ibid: ). The crime of forced marriage of girls and women often go unprosecuted though Afghan national law states it as a crime. The society, judges and even prosecutors do not normally take it as a crime. Hence, the practice of forced marriage is a common phenomenon. There is customary law mostly based on the Islamic laws of women and girls who commit adultery, and sex before marriage is termed as Zina. The offender of Zina crime is stoned to death in serious cases and others upto ten years imprisonment. There are many cases of running away from home among girls who were forced to marry.

3. The Historical Background Islamic Law in the Afghan State

Afghanistan was founded by Ahmad Shah Durrani in 1747 who ruled till 1773 with absolute power. During his time, the administration drafted a legal code and the courts were in the hands of the ulama (religious scholars) except the death penalty which is to be approved by the king or a governor. After Ahmad Shah’s rule, the primary judicial basis remained in the tribal code of the Pashtunwali (Pashtun code of conduct) though shariah courts existed in urban centres until the end of the nineteenth century (Mariam 2004). Till today, the formal legal system is not available mostly in rural and tribal Pashtun areas. The Pashtun social code, the Pashtunwali and other customary laws perform the function of law on social decisions and legal adjudications. However, during the time of Amir Abdur Rahman (1880-1901), Islam was the driving force for his centralised rule (Etling 2003: 6). He made all laws to act in accordance with Islamic law and gave shariah importance over customary laws. Thus, Islam not only influences the legal system but also had an important role in state affairs.
The King Amanullah (1919-1929), took up the secularisation process and introduced several reforms intended to modernize Afghanistan. He abolished the traditional veil for women and opened a number of co-educational schools. Later it formed the basis for democratization and the promulgation of the 1964 constitution under Zahir Shah (1933-1973) (Etling 2003: 7). Muhammad Daud’s republican government set up a one-party government, a “democracy based on social justice.” With the intention of giving power to the majority – farmers, workers, and youth, he introduced 1977 Afghan constitution. After the Daub government, Marxist government continued to carry out the land reform. In spite of brutal political executions to suppress the resistance of the land reform, it was not successful.

There was strong politicization of Islam during the mujahideen resistance to defend the country against the Soviet invaders between 1979 and 1989. Though there was Islamic movement which originated in 1958 in the Kabul University among the Islamic laws faculty in particular, their strength to draw political support came only when Soviet was defeated. After the defeat of Soviet, the Islamic state of Afghanistan was formed with religious official taking up the state political function. Nevertheless, the religious official and mujahideen were not expert to take the political responsibility and run the state. Meanwhile, the rivalries between mujahideen groups and civil war added to the problem of political stability of the weak state (Mariam 2004).

During this period of political instability from the year 1992 to 1994, Taliban emerged in the Afghan political scenario with the promises of greater security and an end to the civil conflict. Taliban established a theocratic regime under the leadership of Mullah Muhammad Omar who proclaimed himself “Commander of the Faithful”. The government of official and leaders were mainly the members of the ulama. The Taliban enforced strictly the Islamic religious laws largely based upon Wahhabism. However, the rule of Afghanistan with religious laws ended with the fall of Taliban in 2001.

One of the main objectives of the Taliban controlling Afghanistan was to establish Islamic states and rule on the basis of Islamic laws (Marsden 2002: 62). The Taliban after
getting their foothold in Afghanistan introduced the name ‘Islamic Emirate of Afghanistan’ and enforced the rigid Islamic laws. The decision of Taliban on any matter is based on the will and advice of the Amir Al-Mu'minin, who is believed to guide on the basis of Sunnah (Marsden 2002: 62). In the name of liberating Afghanistan from the influence of infidel rule and ideology, Taliban took the puritan policy. According to K.B. Usha (2004: 230), the Taliban interpreted the Quran in such a way for their political interest and personal whim and used Islam to hide their brutal crimes. Taliban’s religious policies were not only opposed by international community but also by the people of having Islamic faith or believer.

Under the Taliban regime, the conservative interpretation of Islam was introduced. The harshest implementation and punishment used by Taliban in the name of Sharia’s Laws is Hudud, the stoning of adulterer and amputation of the thief. The implementation of Sharia laws and Hudud in particular according to the Taliban is for the safety of the life and property of the people (Marsden 2002: 63). Men and women were restricted in their behaviours and dressing in the fate of dignity and honour of men and women. Men were asked to wear traditional clothes and avoid western designed clothes and avoid shaving. Men were asked to strictly observe their religion and asked to pray five times in a day preferably in the Mosques. Music, games, visual representation of human and animal, women public bath places, etc., were banned.

Women were the worse victim under the rule of the Taliban. According to Taliban, “women face corrupt men” (Moghadam 2002: 26) and introduced their decrees restricting women from public space. Women were asked to observe Hejab (seclusion from society) by wearing burga to cover their whole body. Women were not allow to worked outside their home, barred from education, public baths and even asked to screen or paint the window of women in order to avoid men seeing them inside.

4. Islamic Law and Afghanistan’s Legal System

From the early formation of the modern state, Afghanistan has been ruled mainly under Islamic law. Afghanistan’s legal system has been a mixed one that consisted of Islamic
law, state enacted legislation, customary and tribal laws. The Islamic law has played an important role till today in Afghan legal system, traditionally administered by ulama. The Islamic Laws has also, to some extent, been incorporated as part of the law of the state. The Afghan constitution has given special place to Islamic laws, such as the 1931 Constitution making Hanafi jurisprudence. The state religion and Islam was declared as the religion of Afghanistan by the 1977 Constitution. The 1964 Constitution also prescribed that the state should conduct its religious ritual (Nawabi 2004).

During the years from 1960s to 1970s, the state legislation such as the Penal Code (1976) and Civil Code (1977) tried to strengthen secular law (Ibid). Under the 1964 Constitution, secular laws were introduced in the courts and shariah to apply only in areas where secular law did not exist. However, the new 2004 constitution of Afghanistan brought back greater role for Islam and Islamic law. The Preamble itself states that “with firm faith in God Almighty and relying on his mercy, and believing in the sacred religion of Islam.” The Article 1 and 2 of the constitution declared Afghanistan as an Islamic Republic and Islam as the sacred religion of Afghanistan respectively. The most controversial article of the new constitution is Article 3 that states, “In Afghanistan, no law can be contrary to the sacred religion of Islam and the values of this Constitution.” The article threatens the UN Charter and international treaties and conventions, which Afghanistan has signed. The constitution also mentioned, in Article 17, requiring that the state adopt measures to the development of religious education, organizing and improving the conditions of mosques, madrassas and religious centres along with the promotion of education. These prove that till today Afghan legal system directly and indirectly influence the legal system of Afghanistan.

4.1 Shari’a and the Afghan Justice System

The major population of Afghanistan are Sunni Muslim with very few Jews and Sikhs. As such, the Sharia (Islamic laws) is attached to Afghan community from the early days as justice giving laws. Afghanistan legal system consists of Islamic laws and state laws. As Afghan legal and judicial system are unable to provide basic rights to the people since
there is no access to the statute and associated legal materials, the courts apply Islamic laws (Lau 2004: 2). Even after the introduction of the famous 1964 Afghan constitution, statutory laws had insignificant role and Islamic laws sometime come into conflict with the existing state enacted laws and customary laws (Ibid).

The factor why Sharia is important to the people of Afghanistan is that it derives primarily from Quran, the holy book of Islam, and Sunnah, the statements and deeds of Prophet Muhammad. In certain cases where Quran and Sunnah did not touch, Qiyas, the analogical reasoning, and Ijma, the consensus initially of the consultant appointed by the Caliphs, the leaders of the Muslim community and the Sohaba, the Prophet’s associates after the death of Prophet Muhammad are taken into consideration for resolving them. In the contemporary situation the Islamic jurist’s consensus and their opinion became binding with absolute authority (AI Report 2003: 5). With these components Sharia plays an important source in the state legal law in Afghanistan. In Afghanistan Sharia is interpreted by Islamic scholar Ulema who also acts as judge in the state courts. The government established a society of Islamic scholars the Jami’at-al-Ulama, an official institute Darol Olum-e-Arabi and Abu Hanifa, the state-funded Islamic Madrasa in Kabul in order to control Ulema and their interpretation of Sharia and other Islamic laws (Ibid).

The modernisation of justice system during 1950-1960s made the graduate of Darol Olum-e-Arabi and Abu Hanifa study the modern laws along with the Islamic laws eligibility criteria to work as a judge and prosecutors. Sharia laws were assimilated with the modern law in the process of modernisation and there came almost proto-secular Afghan justice system after the codification of Afghanistan laws in the year 1960s and 1970s (Ibid). Till today Sharia remains as an important source of Afghanistan laws and the state laws can not go against to the principle of Islam.

Pro-Soviet government introduced Soviet judicial system which was not successful due to the opposition of the people. The people of Afghanistan have more affiliation to Islamic jurisprudence rather than the state judicial system from early days except in the time of strictest enforcements of Islamic laws in the hand of the Mujahideen Government of 1992–1996 and Taliban’s theocratic regime of 1996–2001.
Hanafi school of law

There are four Sunni schools of legal thought namely, Hanafi, Shafi’i, Maliki, and Hanbali in Islam. In spite of the differences, all four schools are respected and there are cross-pollination of ideas and debates among them. They also respect each other in the understanding of Islam and respect as valid the legal schools of Sunni Islam regarding their analysis of the Qur'an and Sunna. The Hanafi School is one of the four schools of law (Madhhabs) or jurisprudence (Fiqh) within Sunni Islam. The Hanafi, the name of the School of law is taken from the name of its founder Abu Hanafa an-Nu ‘man. The two most important disciples Abu Yusuf and Muhammad al-Shaybani who preserved the legal views of Abu Hanafa an-Nu ‘man. The Hanafi School is considered to be the most liberal, more emphasis on the role of reason comparatively with other three Sunni school of law. It is also the oldest and has more followers among the Sunni school of law. Hanafi school of thought is not only predominant among the Sunnis Afghanistan but also in other parts of Muslim world specially Sunnis of Central Asia, Pakistan, India, China, Iraq, Turkey, Syria, Albania, Bosnia, Pakistan, Kosovo, Macedonia, Balkans, the Caucasus, etc.

The sources of the Hanafi school of thought are laws from the Quran, the Hadith, Ijma (consensus), Qiyas (analogical reasoning). It is one of the earliest Islamic schools of thought proposing the Islamic tenants in everyday life. The school brought about the use of reason in the judgements necessary for the implementation of Islamic laws in a new environment and situation. It is decentralised and non-hierarchical giving more emphasis to reasoning in legal decisions. The school appeal for the personal judgement of reason. It is also given more emphasis to belief and tolerant in the Muslim communities. Hanafi school of thought abstains to control a human religious or spiritual destiny.

Its does not allow any human institution to interfere on the religious matter. The state is given free hand only with human rights within the human affair and relationship. The state has no right to intervene on the matter in dealing with god-man relation. The crimes related to god or religious teaching is under the jurisdiction of Islamic laws on which state have no role. On the other hand, the crimes and human rights violations are to
deal by the state. In such a way, Hannafi school of thought made a distinction on the jurisdiction of religion and state institution in dealing human affair.

5. Afghan Customary Law and its Position

The Afghanistan constitution clearly declared in article 3 that no law can be contrary to the beliefs and provisions of the sacred religion of Islam. There is also a space for Afghan customary law to its legal system by giving the provision that either in State law or in Shari'a; the courts may rely on customary law, provided the convention does not contradict the provisions of the law or the Islamic principles of justice. Due to the almost complete break-down of the official institutions of law and order during the conflict, the people of Afghanistan look forward to the informal legal mechanism to solve their dispute. People have the perception that the formal justice system as foreign institution, which is not relevant to deal with their disputes, which are usually, related traditional and customary perspective of justice.

According to IDLO Evaluation Reports (2008), Afghan Customary law is well-established, well-known and perceived to be legitimate among the people. They have faith in customary law in restoring justice. It is also stated that currently about 80 percent of all legal dispute is dealt with through customary law in Afghanistan. The same time customary law is cheaper, faster and more accessible to the people and has satisfaction in dealing the cases than the formal justice system with alien laws and judicial mechanism. In spite of the fact that informal justice system conflict with Afghan law, principles of natural justice and the state's international legal obligations, cases of women rights, people from conservative, illiterate and rural areas prefer informal system.

Statutory law of Afghanistan is alien to the majority of the Afghanistan population of the rural areas. They prefer dealing their cases in informal justice system as they are accustomed to the old customary laws even though it has negative features and outcomes. They have their own cultural and ethnic set of rules to regulate their community especially in the rural areas where the state authority could not reach. Afghans have customary laws and practices to solve the conflict on their own ways.

75
without the use of the state or religious laws. The tribal people of Afghanistan have strong sense of community ties and social order. Apology, forgiveness and reconciliation are the ways the traditional Afghan customary tribunal to solve their conflicts. They have the principal of “Restorative justice” in most of the Afghan customary system (Senier 2006: 3) for they aim primarily to solve the conflicts for social order and community harmony rather than punishing the culprits.

Though to some extent they permitted blood feud within acceptable limit (Barfield et al., 2006: 6) Afghan customary justice system demand for apology and reconciliation through compensation, payment or exchange of women within the disputing parties, return of the stolen good, blood money in case of revenge, etc. For the individuals and parties involved in the conflicts, the practice of the poar (blood money) system for murder is common. In the system of poar two fair virgin girls are given to the victim family by the accused. The logic behind the system of poar is that the enmity between the conflicted families will disappear by sharing blood line in their offspring through marriage. Though there are many negative aspects in Jirga and Shura, the Afghans have opted for it because of the failure of the state judicial system. The people in the south and east of Afghanistan practise the customary laws known as Pashtunwali in every aspect of their life. It is also considered as legal laws in the Pashtun dominated areas in Afghanistan.

5.1 Pashtun Customary Laws System

Pashtunwali the tribal code of Pashtun is considered to be the most developed code of customary law in Afghanistan. It is the Pashtun tribal code of honour and identity. It is a set of rule to be followed by the Pashtun and in return give honour, support and protection from the community without which Pashtun lost their honour and identity. The Pashtunwali set of rule includes:-

i) Ghayrat and Nang (chivalry): Ghayrat is the bravery in fighting against their enemy especially during war and defend the honour against the shame to the Pashtunwali norm. Women spur their head shawl (poranai) to help and encourage
men fighting in the war, but it is of a limited role that they play in this concept of chivalry. The Badal (revenge) are permeated to certain limit to maintain the honour of the Pashtunwali (Kakar 2005:4).

ii) Melmastia (hospitality): Hospitality is one of the concepts of honour to expand their social networks. Feeding of strangers and friends, gift giving and defending the guest from its enemy in the house or in the guesthouse (hujra) are also a part of Melmastia. Women mediate the family’s enemy as guest to stop conflicts and women may also “call out” (nariqawal) the man whom she wants to marry if she is forced to marry without her consent. If the woman comes to man house as a guest, the man is obliged to accept it.

iii) Purdah and Namus: Purdah literally means restrictions of men and women to enter into each other’s space. However, Pashtun gives restriction to women who consider it as the defence of honour of the women (Ibid). The practices of Pardah have different ways among different communities. In some community, especially from nomadic tribe, they only veil their face when they move out of their house. Under purdah, the extreme cases are when women were not allowed travelling alone, barred from education and health care, etc. Namus is the defence to the person who dishonour the gender segregation in the society.

5.2 Non-Pashtun Customary Laws System

Non-Pashtun Afghan ethnics have similar Jirga like ad hoc assembly Shura with village elders, clerics and prominent political leaders as their members to mediate and judge their conflicts. Some of the non-Pashtun customary laws systems are as follows:

i) Shura-i-islahi: For Tajiks, Uzbeks, Hazaras, Turkmens and Arabs have the resolution council Shura-i-islahi that deals with mostly of the serious issues. In the council Shura-i-islahi, Sharia laws play an important basis of law in the proceeding of conflict resolution compared to other customary conflict resolution.
ii) **Arbad**: The Arabs have representative system known as *Arbad* who represent on behalf of the village to the government administration. *Arbad* may be appointed by state official or by the community to play a mediatory role between the villager and the government official in solving conflicts.

iii) **Shura-i-Jammakhama**: It is another customary law system of Afghanistan for *Ismaili Shia* community. Here the clergies, who are well known to *Ismaili* rule and logic of religion plays a vital role. Clerics (*Mukhi*) act as the judge and lead the *Shura-i-Jammakhama* and for the larger serious matter village heads joint the Mukhi.

As is mentioned above, Afghanistan customary laws systems are different for ethnic groups living different regions. The Afghanistan central regions of Bamiyan, Orozgan, Wardak and Balkh where Hajaras are in majority and geographically close to Pushtun dominated south and east region have common custom. The Nuristan provinces, in the eastern part of Afghanistan where tribe like Kata, Kom, Kuslh, Parsoon, Ashkoon and Guar inhabit are governed by their customs. The decisions of the village council (*Jirga*) are the laws for the people of this region (The International Legal Foundation Report 2004: 8). In the case of the northern region, diverse ethnic tribes of Tajiks, Uzbeks, Turkmens, Arabs, Ishmailis and Pushtun have different customs and sometime it does mingle together.

The procedure of decision-making and dissolving the disputes are different among the ethnic groups based on regional differences. The conflicts are brought to justice through *Jirga* and *Shura*. All members have equal rights and have free and calm discussion in the *Jirga*. However, women and children are not included in *Jirga* whom they consider as “potentially disruptive elements” (Ibid), otherwise, it is open to the public. In the Pushtun dominated areas, there prevails the practice of handing over the property by the both side of the opponent for the enforcement of *Jirga* decision at the end of the proceeding known as *Machilgha* or *Baramta* with the value equivalent to the case of the third party. The decision made by *Jirga* is known as *Tselay* and if the decision is not abided by any party, the *Machilgha* or *Baramta* is given to other party or to the *Jirga*
members as the penalty and the *Nerkhs* (price) is to be given to the victim by the proprietor for the damages.

The decision of the *Jirga* can be asked for a review by another *Jirga* two times if any party is not satisfied with the decision made by the first and the second *Jirga*. However, the third *Jirga* would be final, known as *Takhm*, and the party will have to accept and abide by it. If the final third *Jirga* decision is not obeyed the guilty is fined and the tribe has the authority to even burn down their house. Here *Arbakai* (a group of people who are warriors in times of war and maintainer of the laws and order in the peace time in ancient times) is responsible for implementation and punish the violator of the decision made by the *Jirga*.

The penalty and sentences for the crime committed is also different among different tribes. The Afghan, especially the Pushtun perpetrator is asked for ‘forgiveness’ (*Nanawat*) with the material punishment in order to restore peace and friendship thereafter (Drumbl 2004:15). *Nanawati*, the custom of seeking for apology are also done in different ways. In some crimes, the accused family offers slaughtering of sheep to other party. Crimes for murder usually are compensated by giving two fair and virgin girls if the victim’s family accepted without revenges. However, in the Nuristan province, girls cannot be given as fine to victim family as it is condemned and banned. Among Pashtun the dead bodies are carried to the grave by the relative of the accused and even lied down to the grave dug for the victim surrendering to the victim family as part of begging forgiveness and reconciliation. In eastern *Nuristan*, the murderer and their family are expelled till the conflict is dissolved (ILP Report 2004: 28). In the central *Hazarajat* region, the entire family is punished if a member of the family is accused of theft and asked to promise not to repeat again. In the case of debt, the debtor is considered as a thief and the *Jirga* fixes another day for the payment of debt if the debtor cannot pay on the appointed day. In the region of central *Hazarajat*, debtors are given “indecency” certificate and declared indigent if he can no longer pay his debt and the indigent may not repay again.
The crimes against women are always considered to be a severe crime and asked
for heavy *Khoon* (Poar or Blood Money) (Drumbl 2004:15) including four copies of Holy
*Qoran*, four women, and a fat sheep. For Pushtun, penalty for kidnapping married women
is the same as seven murders. Both man and woman are killed if they are found
committing adultery by consent, and if it is by force, the man will be punished by cutting
off his ear or sexually insulted, and if the adulterer is killed for his crime, the killer need
to compensate only half *Poar* of a murder. If the husband injures or kills his wife, his
father-in-law can claim *Paor*. If the widow is to marry a person from a different tribe the
husband is considered a kidnapper and fined *Poar* on the background that he insults the
tribe of the widow. The people of the region of central *Hazarajat* hardly talk about the
crimes, especially against women in order to avoid insult from the people and the
criticism of the religious leaders (Wardak 2004: 34). The *Jirga* of this region prefer
compromise and apology between the parties or send the case to the government. The
practice of giving girls to the victim family is not common in this region. In the region on
the eastern part of Afghanistan (Nuristan province), if the adulterers are married, the
husband of the women or even the witnesses of the crime can kill them both and if they
are unmarried the *Jirga* will ask both the family and marry them.

The negative aspects of the customary laws are that it is neither codified nor
written and has no proper structure and procedure which provide space for the people
who have vested interest. It does not reach up to the International Human Rights standard
in many aspects especially in dealing crime and women rights perspective. Since the
government of Afghanistan has no authority in especially many districts in the northern
regions, informal justice mechanism came under local commander and they play
important role in the decision making and resolving dispute in this region. The majority
districts of the *Faryab* and *Jawzjan* in the northern Afghanistan adjudicate the dispute by
local commanders who rule over the region. Since they rule over the region, the
responsibility to solve conflicts and disputes are in their hand. The Mullahs and elders
also play important role though local commander controls the justice system in some of
the regions of Afghanistan.
6. Informal Justice Mechanism

It will be incomplete if we do not touch Jirga and Shura when dealing the justice mechanism in Afghanistan. The informal justice mechanism Jirga is associated mostly with the Pushtun ethnic groups vastly practiced in the rural areas. The Shura is another informal justice mechanism similar to Jirga, a council of non-Pushtun ethnic of Afghanistan. It has the similar informal mechanism of decision making and conflict resolution as of the Jirga. However, Shura is an ad hoc assembly and meets for certain need or to resolve certain conflict. The main sources of law used in Shura and Jirga are the Sharia and their customary laws. It mainly deals with the dispute related to family, land, property, crimes, etc. The type of Shura and Jirga vary from region to region and community to community. The negative aspect of the informal Afghan justice mechanism is that there is no regulated procedure which results in chances that informal justice system may adjudicate the case under the influence of any external actor(s).

The original term Jirga is defined by many scholars in different ways but have common similar meaning of the Jirga as the gathering of the people to resolve the dispute with the common consensus (Wardak 2003: 3). Jirga is the tribal traditional council where people come together mainly elders, Ulema and prominent figure in the society to take decision of any matter in Afghanistan. Jirga plays important role in solving the conflicts even of the non-Pushtuns on request (Ibid: 5). Ali Wardak divides Jirga into three levels-the Maraka, at the local level, Tribal Jirga, at the tribal level and Loya Jirga, at the national level.

I) Maraka: It is an informal mechanism of conflict resolution having more or less the similar features of Jirga. Sometimes the terms Maraka and Jirga are used interchangeably between them. However, Maraka deals with smaller, less serious conflicts and criminal matters mostly at the local inter-village level compared to the Jirga. Maraka have four important elements i.e. i) Narth (the customary laws); Narth are civil and penal tribal customary laws that apply in the decision making and conflict resolution process. ii) Marakachain (the member of Maraka); the member of Maraka consist of Mashran (elders), Speengiri (people with grey
beard) and Speenpatkian (the mullahs); and iii) Institutional ritual, the ritual is different in different cases. Usually before the proceedings of \textit{Maraka}, reciting verse(s) of \textit{Qura'an} is done and ends with prayer. iv) \textit{Prikra}, (the final discussion), the final decision of \textit{Maraka} aims for the satisfaction of both parties on conflict. The disobedience of the \textit{Prikra} are fined (\textit{Nagna}) or ex-communicated from the community. If any one of the parties is dissatisfied with the decision taken by \textit{Maraka}, they can appeal to another \textit{Maraka}. If the \textit{Maraka} proved wrong in the application of the \textit{Narth} then the \textit{Maraka} have to compensate the victim party known as \textit{Tawan} (compensation) (Wardak 2003: 9).

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

The final decision (\textit{Prika}) of the \textit{Qwami Jirga} is done on the basis of consensus for their main aim is social order in their tribal community and not only to solve the particular conflict. If the \textit{prika} is not satisfactory or \textit{jirga} break down then it can be reconvened three times and the third \textit{Jirga}’s decision is the final \textit{Prika}. Every free male of the tribe are allowed to take part in the proceedings of the \textit{Qwami Jirga} and thus brought a sense of equality. The process of \textit{Qawmi Jirga}, like that of other \textit{Jirga}, communicates to their community the social order based on the customary laws especially the \textit{Pushtunwali} and \textit{prika} that binds the whole community over and above the kinship ties.
Many time women crimes are undermined considering it as private and family affairs.

There are a number of cases were women and girls are being subjected to serious human rights abuses as a result of informal justice mechanisms. The informal justice mechanism in Afghanistan has no regulated procedure of adjudication and there are risk of violation of fair trial and human right of international standard. Without systematic monitoring regulation, the jirga and shura sometimes go against international concepts of human rights. The Jirgas dealt with all sort of disputes extending from minor to major cases like murder. They have an objective of restoring communal harmony, sometime by exchanging of young girls undermining their rights. The serious conflicts are resolved by giving two young girls to the victim family to negotiate and bring the harmony that damage caused by the conflict between them. United Nation reports (2003) states that women and girls are subjected to human rights abuses as a result of informal judicial mechanism (jirga) adjudication with the application of tribal law and traditional norms. The number of cases also reported women and girls are being subjected to serious human rights abuses as a result of informal justice mechanisms.

The local informal justice mechanisms often are influenced by the members of armed groups which are a serious risk to persons accused of criminal offences in informal mechanisms. Women and girl are vulnerable in such adjudication conducted by the informal justice system. There were cases where girls were compensated to the victim by the perpetrator in accordance with the order of the informal justice mechanism. The girls compensated to the victim were usually young girl. The future of the girl is dependent on the victim’s family. They may forcefully marry her or work for the victim family without her consent. Women and children are not allowed to join and participate in the local Shura and Jirga. They are not accessible without the male relative or supporter and they are usually discriminated in the matters of inheritance, property and marriage (Amnesty International 2003).
7. The Afghan Formal Institutional Justice Mechanism

Afghan judiciary has Supreme Court, Court of appeal and the Primary court. There are also specialised courts established by Afghan law such as juvenile court, family courts, public security courts, commercial courts, etc. to deal certain cases. The Supreme Court, headed by the chief justice is the highest court and responsible to the organisation and administration of the lower court of Afghanistan. The Afghanistan Supreme Court under the chief justice nominates the candidate for judicial appointment and determines the number of primary courts to the province based on the necessity. The high court of appeal is the next highest court which has the function to hear the appeal against the provincial court. And the Afghan provincial court set up in the province with appellate power against to the lower primary courts decisions. The Supreme Court is in Kabul and the provincial courts and primary courts are in the provinces. There are still many provinces and districts without enough primary courts in Afghanistan especially in the rural areas. The specialised courts established by the Afghan laws have not been established outside Kabul. As reported by the Amnesty International in 2003, there are no proper premises and facilities, no basic stationary for proper functioning many of the Afghanistan courts.

The judges were appointed by the president on the recommendation of the Chief Justice of Afghanistan. The judge should have a degree in the faculty of law or in the faculty of Shura as a qualification with one year legal professional training. The age of the judge is between 28 to 60 years of age. There is often a situation where there are many judges who have not attained the needed qualification and are not within the age limit for the appointment of a judge. Besides, there is influence of the political groups and armed groups in the appointment of the judges (Amnesty International Annual Report 2003). Women were under-represented and are not in important positions in Afghan judicial system. Even the appointed women judges were under the domination of male judges and were not in the sole adjudication of the cases. There is a lack of concern about the women under-representation and also the resistance to increase the number women judge is opposed by many senior within Afghan judiciary system itself.
As mentioned above, Article 97 of the 1964 Constitution made Afghan judiciary independent. The King, Zahir Shah, set up an independent Supreme Court on October 15, 1967 (Sirat 1968: 567) and Bonn agreement further envisaging the continuity of the independent judiciary of 1967 so that Afghanistan judiciary remains independent till date. However, practically Afghan judiciary is politically influenced by armed groups, commanders, public officials and prominent figure. The Afghan justice system is not still free from evil of bribery and corruption. J. Alexander Their states the unpleasant situation of the Afghanistan court system under the leadership of the Fazel Hady Shinwari and an ally Abdur Rassool Sayyaf. He states that the court of Afghanistan under the guidance of the Fazel Hady Shinwari who led the Afghan court systems appointed the numbers of the non-university trained Muslim clerics to all levels of the court system and accede the number of judge in supreme courts over limit of the Afghan constitution. He further states that the Fatwa council was created to issue extra-judicial proclamations and the lower registers of the court system were declared outside control of the Supreme Court (Their 2004: 7). Low and irregular pay for judges and prosecutors in Afghan judiciary encouraged practice of corruption. The peculiar practice in Afghan court is that the family member insisting the court to detain if the individual go against the will of the family especially the girls who did not agree to marry according to their family wishes. Besides the Supreme Court, the Ministry of Justice keeps an eye on the government on the legal perspective, deals with the legal issue of the government and bears the responsibility of the country’s prison system.

Afghanistan has separate Ministry of Justice. In the Ministry of Justice, there is Law department (the Hoquq) and a Legal drafting department (the Taqnin). The Law department (Hoquq) has departments for each province and in districts. Its function includes conducting a preliminary investigation of case before it comes to the court. They also sometimes mediate for settlements of certain cases. The Legal Drafting Department (Taqnin) scrutinises the draft laws and review national legislation, for compliance with the Constitution, Islamic law, and international legal standards. The department also give, suggestion and advises on the matter of international treaties, conventions, and commercial agreements whether those are consistent with the country’s official laws.
The other important organ of legal system is the Office of the Prosecutor General (Attorney General). It has a role of investigation and prosecution of cases. Its function is constitutionally regulated. It is an independent organ though it is part of the Executive branch of the state. The Office of the Prosecutor General has its offices in each province. Its prosecutors are responsible to investigate and pursue them through the courts and monitor the implementation of laws. The Ministry also acts as the law maker and law enforcer of the government. The crime investigation and prosecution task is carried out by the office of the Attorney General which is a separate and independent executive organ of the Afghan government. The Ministry of the Interior is another law enforcing ministry taking the responsibility of managing and maintaining the function of the national police. In spite of these formations and institution of ministries and other law enforcing organs to the Afghan government, the justice system is far behind to produce credible justice system in the country.

7.1 The Afghan Constitution and Statutory Law

If we look into the Afghan constitution of 1964 the preamble itself speaks about achieving justice and equality for the Afghan people. Many articles of the 1964 constitution of Afghanistan emphasised upon the gender equality. Article 25 states that “the people of Afghanistan without any discrimination or preference have equal rights and obligations before laws”. Article 26 of the 1964 constitution provides rights and liberty to all citizens without any discrimination based on sex. Likewise, the constitution of 1976 also states in article 27 that “all the people of Afghanistan, both women and men, without discrimination and privilege, have equal rights and obligation before the law.”

The Afghan Constitution of 1987 and 1990 further states in Article 28 that citizens of the republic of Afghanistan, both men and women, have equal rights and duties before the law, irrespective of their national, racial, linguistic, tribal, educational and social status, religious creed, political conviction, occupation, wealth and residence. Designation of any illegal privilege or discrimination against rights and duties of citizens are forbidden. And the Article 33 states that “all citizens of the republic of Afghanistan
are equal and uniform to all citizens”. The 2004 Constitution also provides equal legal rights to all citizens. The constitution declares equality of men and women in all aspects. However, it is unfortunate that status of women remains lower and equality of sexes is subordinated to the traditions need of the family and Islamic principles as stated by Sharia (Shankar 2004: 59).

The New Afghan 2004 Constitution is the supreme law of the country. The provisions for individual rights in the constitution are not amendable, though certain right can be suspended during a state of emergency. The preamble of the constitution itself affirmed to observe the United Nations Charter and the Universal Declaration of Human Rights. The constitution endorsed to establish law and order base on the peoples' will and against the oppression, atrocity, discrimination, violence, etc. The Afghan constitution ensures the rule of law, social justice, the fundamental rights and freedoms to the entire citizen.

The constitution provides the National Assembly to make statutory law with the approval of the President accordance with the constitutional procedure. If the President sign the bill proposed by the National Assembly, it becomes a law of the land. The law passed by the both National Assembly with the consent of the President becomes law. The statutory laws will remain as a law until the National Assembly amended with the minimal requires number of vote in the house.

Afghanistan also signed and ratified many international treaties and conventions related to women’s socio-political and economic rights. The new Afghanistan Constitution of 2004 in article 7 states the obligation to abide all the United Nations Charter and the Universal Declaration of Human Rights and international treaties that Afghanistan has accepted and signed. Afghanistan recognised and party to the international treaties and conventions such as CAT (the Convention Against Torture), CRC (the Convention on the Rights of the Child), the Rome Statute, CEDAW (the Committee on the Elimination of Discrimination Against Women) convention, ICCPR (the International Covenant on Economic Social and Cultural Rights), CERD (the Convention on the Elimination of All Forms of Discrimination) and ICESCR (the

7.2 The Afghan Executive Branch and its legal implication

The following constitutes the executive branch of the Afghan legal system. They are:

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

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

iii) **Afghan Police:** The president and Ministry of Interior put the police with the responsibility of maintaining and enforcing the criminal laws of Afghanistan. Police play major role in laws enforcing body of the executive. Peace and security is needed to maintain law and order and justice prevail. The police are the legal executive branch, which is most closely interacting peoples while performing their duty. Maintaining law and order, detecting and discovering the crime is the main responsibility of the police. The Afghanistan National Police (ANP) under the Ministry of Interior has eight regional commands and many smaller commands in the provinces. Corruption and intermediation are also in the Afghan police. In many occasions, the lawbreakers are escape unpunished by bribing the police officer. In some rural areas, warlord and armed groups over-power the police (Nojumi 2004: 29). In spite the training and supported given by the international actors in Afghanistan, Afghan police are still underdeveloped in their skill and man power.

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

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

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

vi) The Central Prisons Department (CPD): The Central Prisons Department (CPD) is also under the Ministry of Justice. It is controlling and maintaining all detention centres and prisons throughout the nation. It is also responsible for transporting inmates to the various courts for trial and hearing. It has inadequate detention centre and prison. There is no proper sanitation and maintenance in the present detention centres and prisons. There is a plan to have detention centre in each administrative districts and prison in each provinces. However, as of now, there are only 120 districts having detention centre. The objective to have detention centre the entire district has to go long distance (Ibid).

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

### 7.3 Afghan Justice System and the Women Rights Protection

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

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

Another controversial case in Afghanistan is rape case. Like family violence, rape cases prosecution is taken very rare in the criminal justice system. Here, the main reason was that, there are no proper facilities and capacity within the criminal
before the 1978 Marxist coup is the legal framework of the justice system in Afghanistan. The current state laws also includes the codified laws of 1975 Afghan civil code, the 1976 criminal codes, the amended code of 1973 on criminal law procedure, and the 1973 law of police. There is provision in the constitution that the area where the present laws do not exist, the Hanafi school of Sharia is to be applied (Wardak 2004: 324).

J. Alexander Their, Senior Rule of law adviser of 'United States Institute of Peace' examined the post-Taliban era judicial development of Afghanistan and opined that "the Afghanistan judicial system has been historically subordinated by executive branch" and "the state is almost never held responsible for its wrong doing, and the state is considered by its self and its citizen to be above laws" (UNDP Afghanistan Human Development Report, 2007; 73). For the first time Afghanistan developed independent judiciary and the Afghanistan new constitution has given judiciary a co-equal branch of government. The post-Taliban judiciary is a part of the government as a separate organ headed by the chief justice. The Afghan Supreme Court is responsible for the protection of the rights of the citizens, overall administration of judiciary, appointment and impeachment of judge and to uphold the constitutional laws and their consistency with the Islamic laws in the country.

However, the current legal system with the lack of infrastructure, without properly trained personnel, unclear and existence of multiple laws, courts with the pressure from warlord, commanders and local authority is not up to international human rights standard. In addition to that, there is a lack of co-ordination and interaction among the judicial personnel. There is no proper rehabilitation programme or prison for the prisoners. Though the 2001 Bonn Agreement authorised the interim government to establish independent human rights commission to monitor human rights, investigation of violation of human rights, and development of domestic human rights institutions, it is still far from reality. They set up human rights commission of Afghanistan, which have no authority and resources to perform its work since its formation. The international actor and Afghanistan government are not sincere and unconcerned in building efficient legal system. The presence of many political and military high ranking officials who were
accused of human rights violation and war crimes in the government of Afghanistan (Wardak 2004: 331) worsen the condition legal system in Afghanistan.

8.1 Women in Afghan Current Judiciary

There were Afghan women working in the judiciary as judges after the Constitution of 1964, since the establishment of an independent judiciary in Afghanistan. Afghan women were in the high positions as heads of the Juvenile Court, Family Court, and even Commercial Courts in the past, graduated either from the School of Sharia or the School of Law and Political Science. Since, the collapsed of Afghan state judicial by war, conflicts and subsequent Taliban rule in Afghanistan, women judges and lawyers disappeared from the court. After the downfall of Taliban, few women came back to court especially in the lower courts and at appellate levels. President Karzai took up significant steps toward ensuring women rights by appointing many women in the judiciary by issuing decrees and later in 2005, three women were appointed as assistant judges in Supreme Court (Basel 2006). There are about sixty five women Judges in Afghanistan which is about 7 percent of total judges in the country.

However, most of the Afghan women are illiterate and lesser numbers of women are in the Afghanistan judiciary. The only women in judiciary are mostly in low positions. Men dominate the key positions in the judiciary where women were underrepresented. The women judges were not performing the same function as a male judge does. The women judges tend to act as judicial clerks rather than involve in the adjudications of cases. According to Amnesty International (2003), a number of senior judges expressed a lack of concern and even resistance to the greater inclusion of women in the judiciary and further stated that many senior judges expressed outright opposition to increasing the number of women judges. Employment of men is more concerned than the appointment of women in the judiciary.

9. The Main Problem of Afghan contemporary Legal System

There are several problems in the Afghan legal system such as inaccessible, corrupted, lack of legal staff, no proper infrastructures, intimidation etc. Among such problems, the
main challenges faced in the contemporary legal system of Afghanistan are integration of state's formal legal system and local informal legal system and the lack of resources and facilities of Afghan legal system.

9.1 Integration of State Formal Legal System

The integration of State and Local Judicial Systems are one of the biggest challenges which will not be easily solved. The concept of justice, the procedure of adjudication and penalty to the law breaker are different and contradict especially in the issue of women rights between these systems. At the same time, there is a huge division in the Afghan population in the preference of these two formal and informal justice mechanisms. The large section of the Afghan population prefers the informal legal systems. The alien, slow, bureaucratic, and corrupt nature of state formal justice systems are the main reasons why people specially from rural conservative areas stay away from state legal system. These local people also consider that the Informal justice system is more relevant for the revival of social harmony and reparation. On the other hand, there are large sections of population who prefer the state justice mechanism. The state legal system is new with lots of obstacles but it is showing the sign of improvement in many aspects. The local informal legal system has not change the way women are treated in spite of the offers and suggestions given by the international laws, 2004 constitution, Sharia, and various provision of the criminal Statutes. The women rights are deprived and the judgments given by them in disputes remain abusive to women. Despite these entire problems, there are also large sections mainly from urban and more liberals who prefer state legal system.

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

The other major problem in the Afghan legal system is the lack of adequate facilities and resources. Due to decades of unending wars and conflicts, Afghan legal records and infrastructure and other facilities have been destroyed. The Afghan state is in the process of nation building and the overall development including legal system is in a slow pace. At present, Afghanistan has just 2,000 prosecutors and 250 lawyers are licensed to practice in court registered with the Attorney Registrars Office till the month of May 2007. Due to the lack of legal research materials, laws, and published opinions, judges have to depend on outdated old laws or legal of other country (Nojumi 2004:13), which are of no relevance in the present condition. Under the Afghan judicial reform, judges have received training from international agencies and support of the international Community to the legal and academic communities of Afghanistan is the new hope for Afghan legal system.

Conclusion

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

The Afghan contemporary judiciary is lack of infrastructure and trained personnel. It has also unclear and multiple law courts with the pressure from warlords, commanders and local authority. In addition, there are lack of co-ordination and interaction among the judicial personnel. There is also the need for proper rehabilitation
Islam cannot be amended. This being the case, it would be an opportunity for religious fundamentalist to further suppress women in the name of Islam if necessary measures are not initiated. The present government in Afghanistan needs to improve upon its control and administration of the legal system to further advance the people and the country. The state legal system needs to be incorporated in other parts of the country with active government participation without leaning to the pressures of warlords, commanders or tribal chiefs to give effective legal coverage to the people, especially women. Besides, the people need to be made aware of the necessity and importance of the effective state’s formal legal system to avoid them from resorting to the traditional informal mechanisms of dispute settlement. This will prevent people, especially women, from unfair trials. Abiding by the agreements and conventions of the international legal system will also enhance the status of Afghan women in the long run. This step is necessary to receive the support of other nations, as the present government of Afghanistan alone will not be able to effectively build the nation without external supports.